DANIELLE FONG
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REFERENCE LIST

Daniel Kiel
Professor of Law at Cecil C. Humphreys School of Law
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Lauran Stimac
Shareholder at Glassman, Wyatt, Tuttle & Cox
Email – lstimac@gwtclaw.com
Phone – (901) 527 - 4673

Applicant Details

First Name	**Jesse**
Last Name	**Hockenbury**
Citizenship Status	**U. S. Citizen**
Email Address	**HOCKENBURJ1@NKU.EDU**
Address	**Address** **Street** **728 Grey Stable Ln, 728** **City** **Highland Heights** **State/Territory** **Kentucky** **Zip** **41076** **Country** **United States**
Contact Phone Number	**8598148106**

Applicant Education

BA/BS From	**Northern Kentucky University**
Date of BA/BS	**December 2014**
JD/LLB From	**Northern Kentucky University--Salmon P. Chase College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=61803&yr=2011**
Date of JD/LLB	**May 1, 2021**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Northern Kentucky Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Kentucky, Ohio**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kreder, Jennifer Anglim
krederj1@nku.edu
(859) 572-5889
Barron, David
davembarron@yahoo.com
Furnier, Robert
rfurnier@furnierlaw.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

April 29, 2022

The Honorable John Copenhaver, Jr.
Robert C. Byrd United States Courthouse
300 Virginia Street East, Room 6009
Charleston, WV 25301

Dear Judge Copenhaver:

My name is Jesse Hockenbury, a Class of 2021 graduate from Northern Kentucky University - Salmon P. Chase College of Law ranked in the top 10% of my class, a Lunsford Law, Business + Technology Scholar, and MBA graduate. I am writing to express my strong interest in serving as your Judicial Law Clerk in your chambers and courtroom. I believe my combination of business, technical and legal skills make me an ideal candidate to perform the legal research, memoranda drafting, project management, and administrative tasks needed for such a position.

As for substantive experience, I currently work as a litigation attorney at BakerHostetler, a nationally recognized litigation firm. This role has providing a strong base of understanding of the discovery processes in civil litigation.

Prior to my current role, I worked at the Hamilton County Prosecutor's Office as a Legal Intern awaiting bar results. Responsibilities for this role included assisting in trial preparation and document management, obtaining records and other evidence for contested hearings and trials, drafting memoranda and correspondence, and observing litigation. Such a role provided an immense amount of experience with both litigation and the courts.

Next, during the summer of 2020 I had the unique opportunity to work on a federal criminal case. The defendant was charged with multiple counts of cyber and computer crimes. As a paralegal, I actively participated in research and the application of constitutional law and discovery standards set forth by the Federal Rules of Criminal Procedure. Based upon my unique technical background, I was able to effectively assist and lead in the analysis of computer forensics reports and communications provided by independent experts.

From October of 2019 to December of 2020, I had the great experience of serving as a Law Clerk for the Small Business and Nonprofit Law Clinic. As a clerk, I was responsible for assisting with client intake, issue identification, legal research, memorandum and opinion drafting, and providing any other required assistance to attorneys. The clinic's mission is to provide legal services to entrepreneurs and small businesses on issues such as business formation, employment law, tax liability, and contract drafting.

In addition to my professional experience, I bring a strong academic background in the areas of law, technology, and business. Most recently, I was conferred a Master of Business Administration from Northern Kentucky University. I received my Master of Science in Management Information Systems from Northern Kentucky University. Finally, I obtained my Bachelor of Science in Computer Information Technology from Northern Kentucky University.

Based upon my legal experience, research capabilities, and academic background, along with my analytical and creative thinking I can provide the research and drafting qualities you are seeking in a Judicial Law Clerk. Thank you for your time, I look forward to learning more about this opportunity.

Respectfully,
Jesse Hockenbury

Jesse Hockenbury
Attorney at Law

jesse.hockenbury@gmail.com
502 - 517 - 9555
728 Grey Stable Ln., Newport, KY 41076

Education

Juris Doctor (Ohio Bar License #101666)
Salmon P. Chase College of Law, Northern Kentucky University - Highland Heights, KY

- GPA: 3.614; Class Rank: Top 10%
- Lunsford Academy for Law, Business + Technology Scholar
- Editor, Northern Kentucky Law Review

Master of Business Administration
Northern Kentucky University - Highland Heights, KY

Master of Science, Management Information Systems
Northern Kentucky University - Highland Heights, KY

Bachelor of Science, Computer Information Technology, Minor in Computer Science
Northern Kentucky University - Highland Heights, KY

Experience

Litigation Attorney – BakerHostetler
Cincinnati, OH (March 2022 – Present)

- Conducted complex discovery and resolved ESI issues arising from the firm's role as court-appointed counsel to the SIPA Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC.
- Performed factual investigation and discovery on cases arising out of the Securities Investor Protection Act (SIPA).

Legal Intern – Hamilton County Prosecutor's Office
Cincinnati, OH (August 2021 – October 2021)

- Assisted with trial preparation and document management, obtained records and other evidence for contested hearings and trials, drafted motions and correspondence, and observed proceedings.

White Collar Computer Crime Paralegal – Jennifer Kreder, Attorney at Law
Cincinnati, OH (May 2020 – August 2020)

- Drafted motions, memoranda, and briefs for a federal white-collar criminal case.
- Analyzed the results of computer forensics reports developed by an expert witness.
- Researched case law on constitutional rights, discovery of digital evidence, and statutory interpretation of cybercrimes to assist in the development of trial strategy.

Law Clerk – Small Business & Nonprofit Law Clinic
Highland Heights, KY (October 2019 – December 2020)

- Researched and drafted memoranda on discrete issues of law related to business transactions.
- Drafted legal agreements, documents, and forms including LLC formation, operating agreements, employment contracts, and terms of service.
- Met with clients, attorneys, and other professionals to discuss details of cases (facts, goals, status).

Lecturer / Associate Director, Student Projects – Northern Kentucky University
Highland Heights, KY (June 2019 – December 2020)

- Developed and implemented a project-based computer science curriculum, with a focus on experiential learning and active engagement in the classroom
- Supported and tutored struggling students inside and outside of the classroom
- Evaluated student performance and maintained an updated learning management system

IT Project Manager / Application Development Manager - Center for Applied Informatics
Highland Heights, KY (November 2014 – June 2019)

- Managed all aspects of client engagements including situation analysis, defining KPIs, budget and timeline development, project management and client communications.
- Led multidisciplinary teams to design and develop web and mobile solutions.
- Analyzed data insights and industry trends to drive solution recommendations and strategies.

Web Development Specialist I & II – Center for Applied Informatics
Highland Heights, KY (June 2011 – November 2014)

- Developed web applications to meet the needs of both internal and external clients.

Licenses & Professional Certifications

License to Practice Law: Ohio (#101666)
Supreme Court of Ohio

License to Practice Law: Kentucky (#99763)
Supreme Court of Kentucky

Project Management Professional (PMP)
Project Management Institute

Unofficial Academic Transcript – Law

Student Name: Hockenbury, Jesse D.
Student SSN: XXX-XX-9146
Student ID: 100206460
Print Date: Jun 16, 2021

Current Academic Program:
JD in Chase College of Law
Major: Law (Part-Time)

2018-2019 Fall

JD in Chase College of Law
Major: Law (Part-Time)

Course No.	Course Title	Grade	Hours	QPTS
LAW 827	Legal Analysis and Problem Solving	P	0.000	0.000
LAW 841	Torts I	B+	3.000	9.999
LAW 852	Basic Legal Skills I - Writing	B+	2.000	6.666
LAW 853	Basic Legal Skills I - Research	B+	1.000	3.333
LAW 888	Legal Studies I	P	1.000	0.000
	Legal Studies			

Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	7.000	7.000	6.000	19.998	3.333
Cumulative	7.000	7.000	6.000	19.998	3.333

2018-2019 Spring

Course No.	Course Title	Grade	Hours	QPTS
LAW 843	Torts II	C+	3.000	6.999
LAW 853	Basic Legal Skills I - Research	B+	1.000	3.333
LAW 868	Basic Legal Skill II - Writing	C+	2.000	4.666
LAW 883	Legal Studies II	P	1.000	0.000
LAW 926	Law, Technology & Entrepreneurship	A	3.000	12.000

Rank: 13/42
Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	10.000	10.000	9.000	26.998	3.000
Cumulative	17.000	17.000	15.000	46.996	3.133

2018-2019 Summer

Course No.	Course Title	Grade	Hours	QPTS
LAW 814	Contracts	A	6.000	24.000
LAW 994	Emerging Technologies and the Law	A	3.000	12.000

Dean's List for the Academic Year 2018-19
Academic Standing: Good Standing
University Honors: Dean's List

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	9.000	9.000	9.000	36.000	4.000
Cumulative	26.000	26.000	24.000	82.996	3.458

2019-2020 Fall

Course No.	Course Title	Grade	Hours	QPTS
LAW 803	Civil Procedure I	B-	3.000	8.001
LAW 818	Legal Methods	CW	0.000	0.000
LAW 819	Criminal Law	A	3.000	12.000
LAW 880	Interviewing, Counseling, & Negotiating	A	1.000	4.000
LAW 885	Digital Commerce and the Law	A	3.000	12.000
LAW 907	Law Practice Management	A	2.000	8.000
LAW 916	Digital Crimes and Torts	A	3.000	12.000

Rank: 6/37
Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	15.000	15.000	15.000	56.001	3.733
Cumulative	41.000	41.000	39.000	138.997	3.564

2019-2020 Spring

Course No.	Course Title	Grade	Hours	QPTS
LAW 805	Civil Procedure II	CR	3.000	0.000
LAW 818	Legal Methods	CW	0.000	0.000
LAW 821	Criminal Procedure	CR	3.000	0.000
LAW 877	Business Organizations	CR	4.000	0.000
LAW 880	Interviewing, Counseling, & Negotiating	A	1.000	4.000
LAW 987	Small Bus. & Non-Profit Trans. Law Clinic	CR	4.000	0.000

Due to the COVID-19 pandemic, the College of Law instituted a mandatory Credit/No Credit grading system for the spring 2020
semester, except for grades from courses completed in the beginning of the semester.
Rank: 6/37
Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	15.000	15.000	1.000	4.000	4.000
Cumulative	56.000	56.000	40.000	142.997	3.575

2019-2020 Summer

Course No.	Course Title	Grade	Hours	QPTS
LAW 833	Professional Responsibility	A	3.000	12.000
LAW 862	Property	B	6.000	18.000
LAW 960	Criminal Adjudication	B+	3.000	9.999

Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	12.000	12.000	12.000	39.999	3.333
Cumulative	68.000	68.000	52.000	182.996	3.519

Unofficial Academic Transcript – Law

Student Name: Hockenbury, Jesse D.
Student SSN: XXX-XX-9146
Student ID: 100206460
Print Date: Jun 16, 2021

2020-2021 Fall

Course No.	Course Title	Grade	Hours	QPTS
LAW 809	Constitutional Law I	B+	3.000	9.999
LAW 845	Wills and Trusts	C+	3.000	6.999
LAW 893	IP/Intangible Rights: Draft & Neg. Strat.	A	3.000	12.000
	Satisfies Advanced Writing Requirement/Drafting Component			
LAW 961	Supervised Independent Research	A+	3.000	12.999
LAW 987	Small Bus. & Non-Profit Trans. Law Clinic	A	3.000	12.000

Rank: 5/35
Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	15.000	15.000	15.000	53.997	3.600
Cumulative	83.000	83.000	67.000	236.993	3.537

2020-2021 Spring

Course No.	Course Title	Grade	Hours	QPTS
LAW 811	Constitutional Law II	A-	3.000	11.001
LAW 823	Evidence	A	4.000	16.000
LAW 899	UCC Basics	A-	3.000	11.001
LAW 927	Law for Digital Entrepreneurs	A	3.000	12.000
LAW 943	Law Review	P	3.000	0.000

Rank: 3/33

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	16.000	16.000	13.000	50.002	3.846
Cumulative	99.000	99.000	80.000	286.995	3.587

2020-2021 Summer

Course No.	Course Title	Grade	Hours	QPTS
LAW 925	Family Law	**	3.000	0.000

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	3.000	0.000	0.000	0.000	0.000
Cumulative	102.000	99.000	80.000	286.995	3.587

NKU SALMON P. CHASE COLLEGE OF LAW
NORTHERN KENTUCKY UNIVERSITY

January 6, 2021

Re: Recommendation of Jesse Hockenberry

Your Honor:

I first met Jesse Hockenberry in my Civil Procedure and Property classes, which accounted for six credits of Jesse's foundational courses in law school. I think it is fair to say that amongst all of the professors at Chase, I probably know Jesse best. And I give him my highest endorsement.

I was so impressed with Jesse's ideas and tech knowledge that I asked him questions about a federal case on which I was working. Jesse knew so much about the intersection of the law and technology at issue, that I asked him to work with me on it. He was instrumental in crafting a cutting edge defense. At issue were various types of software and algorithms the government uses to surveil people. The issues concerned the correct balancing for the need for governmental secrecy and a defense attorney's access to the software and algorithms to be able to defend the client. We worked a few more cases together, and he helped register a trademark for an entrepreneur. I then invited him to do a Supervised Independent Research project with me. That blossomed into two papers, which we plan to publish together on surveillance law and the potential for new legislation. His work has been outstanding.

Finally, I'd like to say that I know how important a personality can be in chambers, as I also was a federal law clerk. You would never regret hiring Jesse. He is smart, hard-working, considerate and humble. I also should mention that he has accomplished all that he has while being legally blind. His class rank is high, but I have no doubt it would be even higher had he been able to rely on vision during class periods, quizzes and exams. Because Jesse was a working evening student, he really could not benefit from long, extended exam periods and such to even the playing field. And he did so well without it. I know Jesse will be a very successful attorney, and I even find him inspirational. I would be happy to discuss him more at any time. You may contact me any time at krederj1@nku.edu or (859) 628-1152.

Sincerely,

Jennifer A. Kreder
Professor of Law

April 29, 2022

The Honorable John Copenhaver, Jr.
Robert C. Byrd United States Courthouse
300 Virginia Street East, Room 6009
Charleston, WV 25301

Dear Judge Copenhaver:

I am writing to recommend Jesse Hockenberry for a judicial clerkship. I believe his intellectual capacity, compassion for the law, intellectual curiosity, and academic performance make him ideally suited for a clerkship.

I taught Mr. Hockenberry in my criminal adjudication course, which is one of three courses I teach as an adjunct professor of law at Northern Kentucky University, Salmon P. Chase College of Law. From the beginning of the course of approximately twenty students through its conclusion, Mr. Hockenberry stood out amongst his classmates. He impressed me with his passion for the subject matter, his ability to critically analyze complex areas of law, and his ability to take the class analysis to the next level by applying the law well to a vast myriad of different, complicated circumstances. Some of that is due to simple talent. The other ingredient, too rare in law students today, was his profound long-standing interest in the law in general and in subject matters relevant to succeeding as a post-graduate clerk for a federal judge. As an attorney who has spent the past nearly eighteen years representing death-sentenced in state post-conviction and federal habeas proceedings, and as someone who has taught a law school course on federal habeas corpus, I am well aware of the complexity of matters federal district judges handle on a daily basis. My career has also made me aware that habeas corpus cases take up a significant portion of a federal district judge's docket. I have no doubt that Mr. Hockenberry is up for that task, can handle the complexity of a federal court's work, and would excel as a law clerk for a federal judge. This conclusion does not just stem just from teaching Mr. Hockenberry as part of my criminal adjudication course.

After the course concluded, Mr. Hockenberry sought me out for additional dialogue and advice as he continues to pursue his legal career, and to review and edit a draft of his law review article. I did so, and was impressed by the quality of his writing skills and analysis. It was of professional quality and needed few substantive edits, furthering my already strong opinion of Mr. Hockenberry's legal capabilities.

Mr. Hockenberry's academic performance demonstrates a level of excellent over the past few semesters that has resulted in his high class rank. On all scores, Mr. Hockenberry has earned my highest recommendation.

Sincerely,

David M. Barron

Adjunct Professor of Law, North Kentucky University Salmon P. Chase College of Law

Staff Attorney III, Kentucky Department of Public Advocacy, Capital Post-Conviction Unit

502-782-3601 (office) ; 646-279-6902 (cell)

david.barron@ky.gov ; barrond1@nku.edu ; davembarron@yahoo.com

NKU CHASE
COLLEGE OF LAW

June 6, 2021

RE: *Letter of Recommendation for Hockenbury, Jesse D.*

To Whom It May Concern:

I write to highly recommend Jesse Hockenbury for a judicial clerkship. Since 2017, after nearly 35 years in active practice, I have taught at Chase College of Law, Northern Kentucky University, and served as the Director of the Chase Small Business & Nonprofit Clinic and of the W. Bruce Lunsford Academy for Law Business + Technology. Jesse was among the best and brightest of the hundreds of law students I have taught in my four-year tenure at Chase. Undoubtedly, Jesse will be among the best and brightest clerks that have clerked for you.

I have known Jesse since January 2019 when he was a first-year law student and Lunsford Scholar at Chase. Indeed, I undoubtedly know Jesse and his work better than any other Chase professor or administrator, as Jesse was enrolled in seven of my classes and worked with me outside the classroom. The Lunsford Academy is an honors program restricted only to students with the strongest academic credentials. Jesse proved worthy of his selection, earning A's in all of the classes that I taught him.

I helped create, and have taught, a law and technology curriculum of nine courses for students in both our Juris Doctor and Master of Legal Studies programs. Technology is transforming both the substance and practice of law. Our curriculum, available to Lunsford scholars and all other Chase students, helps to train lawyers on the impact that technology has, and will have, on all aspects of the law and on the legal profession, especially as it moves into the cloud. With his undergraduate and graduate degrees in computer science and his formidable academic background in law and technology, Jesse will be an invaluable resource to any judge as courts evolve online and confront the unique challenges that technology-related litigation may pose.

Northern Kentucky University Chase College of Law Nunn Drive Highland Heights, Kentucky 41099

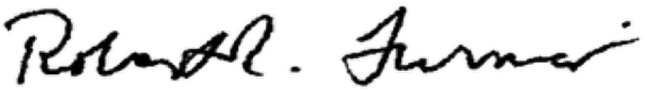
Letter of Recommendation
Jesse Hockenbury
June 6, 2021
Page 2

As mentioned earlier, I have known Jesse in and out of the classroom. He has helped develop legal applications and participated in tech competitions under my supervision. Moreover, he spent a year serving as an intern in the Chase Small Business & Nonprofit Clinic serving clients. He was always diligent and hard working. Most importantly, Jesse is of the highest caliber as a person, honest and compassionate to a fault.

Though Jesse would not consider it noteworthy, I would be remiss if I did not mention that all his great accomplishments have come despite suffering from a significant vision impairment. In all my classes, Jesse never sought any accommodation. As a commissioner on the ABA Commission on Disability Rights, I believe that Jesse exemplifies everything we would hope for in an attorney, with or without a disability.

Jesse Hockenbury is as fine a young person as I have ever known. You would do well to hire Jesse as your judicial clerk.

Sincerely Yours,



Robert R. Furnier
(513) 604-5449
furnierr1@nku.edu

Autonomous Criminal Investigations: Who Is Ensuring Constitutional Rights Are Protected? Who Watches the Watchers?

Abstract

Law enforcement investigators are now equipped with technological advancements that allow for the tracking, searching, measuring, detection, and identification of people's alleged criminal conduct in nearly any aspect of life. Criminal cases challenging the reliability of such technology have encompassed such activity from financial, the possession and distribution of child pornography, driving under the influence to terrorism. Evidence collected from technology-based investigations serve as the basis for probable cause, the issuance of search warrants to raid their homes, the arrest of a suspect, and serves as key evidence at trial. And the defendants rarely have the chance to even inspect the technology when there is evidence of its malfunction. Defense counsel have been met with fervent opposition asserting a lack of materiality and broad interpretations of the law enforcement exception to discovery. Courts are split, with more leaning towards protecting software to preserve its utility to catch other suspects. This article will examine the current split and provide policy recommendations on how the court should proceed to protect a defendant's due process and right to a fair trial while best serving the societal need to catch true criminals.

Introduction

Imagine, you are a vice president of a major financial institution, married with two children, and have elderly parents to care for. One evening while eating dinner you hear a knock at the door followed by voices yelling "Police." As you open the door an army of police officers, with guns drawn, swarm inside your home placing you in handcuffs, seizing all of the electronic devices in the home, and arresting you for the possession and distribution of child pornography, all of which occurs in front of your children. You adamantly refute the charges and plead not guilty to all charges. Based upon these charges, Child and Family Services gives your spouse two options abandon you or lose custody of the children. You are fired from your job and become instantly vilified in the press.

The Government states that their investigative software monitored your computers for months culminating when your computer accessed and download files. In preparation for trial, the FBI searches your electronic devices, but is unable to locate a single file you are accused of distributing on any of the devices seized. At this point, you believe you have been exonerated, but you are not, the Government proceeds citing the software's successful file download on your devices.

In an effort to prove your innocence, you proceed to trial. The only way you can prove your innocence is to prove the faultiness of the software the Government relies upon exclusively. Pursuant to the rules of criminal procedure, Rule 16, you file a discovery request for an independent expert to access, examine, and test the validity and fault tolerance of the software.[1] In response, the Government refuses your request, claiming it is immaterial to the preparation of a defense. Additionally, the Government claims the software is proprietary and covered under law enforcement privilege. The decision whether you are entitled to an independent examination will be determined by the Court.

There is one final very important fact in this scenario, you are completely innocent, you never did what they accused you of nor would you ever. Without access to the software it will become impossible for you to prove your innocence and will likely face more than 10 years in prison, for a crime you did not commit.

Courts, federal and state, are currently split as to whether a defendant is entitled to an independent examination of investigative software, when it serves as the primary piece of evidence to support a search warrant, an arrest, and inevitably a conviction.

These investigative techniques and reliance upon software continue to grow throughout the country and have become a mainstay in white-collar investigations. Any American with an electronic device could face this same exact scenario. Governmental intrusion and monitoring through the use of technological advancements, without oversight and accountability, should scare each and every American.

This note will begin by outlining each of the constitutional and procedural challenges, and potential violations, that the use of autonomous investigate software poses to a defendant when a defendant does not have proper access to examine the software. For each constitutional and procedural protection discussed, an overview of the existing law, the burden required to challenge a potential violation, and the role a lack of discovery plays will be covered. Finally, this note will address the changes that can and must be made, to prevent wrongful convictions at the hands of faulty software.

Constitutional Protections

The United States Constitution (Constitution) serves as the basis of protections and rights for all persons within the territory. The protections provided by the Constitution are intended to ensure the protection from government overreach or the encroachment upon fundamental rights.[2] The Constitution

[1] Fed. R. Crim. P. 16.
[2] *U.S. Const. amend. V, XIV.*

specifically provides several rights to those who are suspected of or who have committed criminal conduct.[3] The rights afforded to such persons include protection from: unreasonable searches and seizures; a defendant from being compelled to self-incriminate; depriving any person of life, liberty or property without due process of law; evidence being presented without the right of confrontation; and the protection from being tried more than once for the same offense.[4]

Each of these constitutional rights are being challenged, trampled upon, or even foregone when it comes to electronic devices, the data within, and transmission of such data over networks.

Fourth Amendment: Protection from Unreasonable Search and Seizure

The Fourth Amendment provides that people should be free in their persons from unreasonable searches and seizures by the government or its' agents.[5] The amendment reads:

> *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*[6]

A search, in the criminal context, is any encroachment or intrusion upon the reasonable and justifiable expectation of privacy.[7] Reasonableness is based upon the totality of the circumstances and whether a reasonable person would expect privacy.[8] Courts have, over the years, identified several circumstances when a search is reasonable including: a search incident to arrest, abandoned property, or an automobile.[9]

Courts have begun examining the reasonable expectation of privacy an individual has in their electronic devices and to the data within.[10] Courts have started to recognize the large role that electronics, containing gigabytes of personal data, such as cell phones, play in people's everyday lives.[11] This protection extends

[3] *U.S. CONST. amend. IV - VI.*
[4] *U.S. CONST. amend. IV - VI.*
[5] *U.S. CONST. amend. IV.*
[6] *U.S. CONST. amend. IV.*
[7] Katz v. United States, 389 U.S. 347 (1967).
[8] Katz v. United States, 389 U.S. 347 (1967).
[9] Chimel v. California, 395 U.S. 752 (1969); Arizona v. Gant, 556 U.S. 332 (2009); United States, 362 U.S. 217, 241 (1960).
[10] Birchfield v. North Dakota, 136 S. Ct. 2160 (2016).
[11] Riley v. California, 134 S. Ct. 2473 (2014) (9-0 decision).

to searches incident to arrest.[12] Police are required to obtain a warrant prior to accessing and searching the data of a mobile phone, unless consent or extreme exigent circumstances exist..[13]

Accessing an electronic device's data is not only accomplished through physical access, but additionally through network connectivity and the use of software called a trojan horse.[14]

A trojan horse, or virus, is code run on a device, often without the knowledge of the owner, that allows the author to view, search, track, alter, and control the files of a computer or similar device.[15] One 2009 study found that 14.5% of a sample of 400 downloads contained "zero-day malware," i.e., malware not detectable by current antivirus signatures or other malware detection techniques as of the day it was discovered.[16] The use of a trojan horse by police can easily be analogized as placing a GPS tracker on an automobile, an issue the courts have decided. In *U.S. v. Jones,* police attached a GPS to an automobile for more than 28 days, the Supreme Court unanimously agreed the physical intrusion of the vehicle was a search.[17] Thus, the use of trojan software to track or monitor data on a computer is a search.

The next method of accessing data on a computer is by accessing publicly shared files and folders, made possible by tools such as uTorrent a peer-to-peer networking software. On a peer-to-peer network, files can be shared directly between systems on the network without the need of a central server.[18] The use of peer-to-peer networks, the BitTorrent protocol, and the use of torrent files is completely legal, so long as the content being shared is not copyrighted or illegal by statute.[19] With the growth of such networks the government has increasingly begun to monitor such networks for illegal content. The monitoring of these network does not occur manually, but autonomously through the use of software created by the government, and often their vendors.

Autonomous software continuously searches networked computers who are offering to share torrent files known to hold illegal content, based upon a government-maintained database. The courts have sanctioned short-term

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[12] *Id.*
[13] *Id.*
[14] Jessica Conditt, FBI hacked the Dark Web to bust 1,500 pedophiles, Engadget, Jan. 7, 2016, http://www.engadget.com/2016/01/07/fbi-hacked-the-dark-web-to-bust-1-500-pedophiles.
[15] *See* Norton, What is a Trojan? Is it a virus or is it malware? (July 24,2020), https://us.norton.com/internetsecurity-malware-what-is-a-trojan.html
[16] Havard Vegge, *et al., Where Only Fools Dare Treat: An Empirical Study on the Prevalence of Zero-Day Malware*, ICIMP 2009 Fourth International Conference on Internet Monitoring and Protection, at 66-71, *available at* http://jaatun.no/papers/2009/zero.pdf (last visited July 4, 2020).
[17] United States v. Jones, 132 S.Ct. 945 (2012)
[18] *See* TechTerms, P2P (Peer to Peer) Definition (October 30, 2020), https://techterms.com/definition/p2p
[19] *See* Is it Legal to Download Torrents (November 1, 2020) https://www.hg.org/legal-articles/is-it-legal-to-download-torrents-31511

monitoring in cases such as *Knotts*, where police monitored public movements for three days, but was clear not to endorse "dragnet-type law enforcement practices".[20] More recently, in *Jones*, Justice Alito alongside other justices wrote "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." The issue of whether monitoring torrent networks breaches the expectation of privacy has yet to be directly addressed. Based on precedent, the continuous monitoring of shared files would be highly invasive and far exceeds any waiver of privacy.

A torrent is merely a text file containing instructions on how to find, download, and assemble the file the user wants, which might be software, images, or videos, for example.[21] A torrent does not contain the content to be distributed; it only contains an index containing information about the files associated with that torrent. One bit of information included is the "SHA1 hash" that assembles the "SHA hashes" of the data associated with the torrent. SHA hashes are like fingerprints of the bundled files and are not hashes of individual files, photos or videos.[22]

To elaborate on this, a "hash value" is the product of a mathematical algorithm designed to uniquely identify the contents of a data set, such as a file or set of files.[23] Changes in a single bit of data in a file will produce a new hash value. There are different algorithms that produce different values. The most commonly used hashes are Message Digest version 5 (MD5) and Secure Hash Algorithm version 1 (SHA1), but newer more complex versions of those algorithms have been developed such as SHA2 and SHA3. According to the National Institute of Standards and Technology (NIST), the MD5 and SHA1 hash algorithms were determined to be susceptible to collision.[24] Collision happens when two different datasets or files produce the same hash.[25] Therefore, relying on these hash values to identify a file becomes problematic because the MD5 and SHA1 hash values are no longer reliable for file verification. Regardless of the unreliability of SHA1, file sharing software and law enforcement's software relies on these SHA1 hashes of torrents, known as an "info hash", and its associated files.[26]

The client software, i.e. uTorrent, reads the instructions in the torrent, finds the pieces of the target file from other BitTorrent users who have the same torrent

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[20] United States v. Knotts, 460 U.S. 276 (1983)
[21] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019).
[22] *Kenneth Hartman, Bit Torrent & Digital Contraband (May 22, 2019), available at https://www.sans.org/reading-room/whitepapers/legal/paper/36887 (SANS Institute Information Security Room Graduate Student Research White Paper). This source provides an excellent explanation of current BitTorrent functionality.*
[23] 22 Intell. Prop. & Tech. L.J. 6, 11, 22 NO. 4 Intell. Prop. & Tech. L.J. 6, 11.
[24] AccessData, MD5 Collisions: The Effect on Computer Forensics 2 (2006), available at http://www.accessdata.com/media/en_US/print/papers/wp.MD5_Collisions.en_us.pdf.
[25] 22 Intell. Prop. & Tech. L.J. 6, 11, 22 NO. 4 Intell. Prop. & Tech. L.J. 6, 11.
[26] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019).

in a "handshake," and downloads and assembles the pieces, producing a complete file.[27] Until someone actually downloads a completed file, it is not "possessed" in any criminal sense.[28]

It cannot be stressed enough that neither info hashes, the torrents they reference, the file names, nor the hash values contained within the torrent are synonymous with downloaded files or even attempts to download a file. A torrent is merely a "catalog" that contains only textual data and does not contain any illegal content such as copyrighted images or videos.[29] By possessing a torrent, the user downloads information about files on the BitTorrent network (not even necessarily searched for personally) and may be unknowingly and even unwillingly advertising that information on the network without actually possessing the files detailed in the torrent.[30] The torrent contains information that describes the file searched for and countless other files the user did not search for. The user is not even able to see what other files the torrent describes, which may be listed in hidden files. A user downloading a torrent expecting legal content may end up possessing illegal content by accident.

The results of the monitoring are provided to police for further investigation.[31] Investigating officers use government-backed software.[32] One such software is Torrential Downpour, a modified version of BitTorrent software, that allegedly allows for the download of a suspected file directly from the suspect computer, rather than from multiple peers on the network simultaneously.[33] A "successful download" notation in the software log serves as the sole basis or evidence that supports probable cause necessary to receive a warrant.[34]

This warrant allows police to enter the defendant's home, where an expectation of privacy exists, and to seize electronic devices potentially containing contraband.[35] When an expectation of privacy exists, law enforcement is required to obtain a search warrant from a neutral and detached magistrate, based upon probable cause through evidence presented to the magistrate, and particularly describe the places to be searched and the items to be searched for.[36] Law enforcement must provide all relevant facts to the magistrate, including those that may be exculpatory to ensure fairness, as the opposing party is absent and the

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[27] Malibu Media, LLC v. John Does 5-8, 10-14, 16, 18-21, No. 12-CV-02598-WYD-MEH, 2013 WL 1777714 (D. Colo. Apr. 25, 2013).
[28] 18 U.S.C § 2252(A).
[29] 22 Intell. Prop. & Tech. L.J. 6, 11, 22 NO. 4 Intell. Prop. & Tech. L.J. 6, 11.
[30] United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012);
[31] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019).
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] Carroll v. United States, 267 U.S. 132 (1925).
[36] United States v. Ventresca, 380 U.S. 102 (1965); Carroll v. United States, 267 U.S. 132 (1925).

proceeding is ex parte.[37] Probable cause exists when there is a fair probability that a search will result in evidence of a crime being discovered.[38]

A search warrant may be based on the information of an informant and its' sufficiency to sustain probable cause is based upon a totality of the circumstances test.[39] The totality of circumstances test considers facts such as informant reliability in the past and whether other corroborating evidence exists to create credibility and reliability.[40] Reliability may not be established through conclusory statements but must be supported through underlying facts.[41] Furthermore, the Seventh Circuit Court of Appeals has stated, "reliable information in the past . . . is an unsupported conclusion which does not demonstrate probable cause."[42]

A defendant has the opportunity to attack the validity of a search warrant and the admission of any evidence obtained during an illegal search.[43] The first method of invalidating a search warrant is challenging its' lack of particularity to the location of a search and what is to be searched for.[44] The second and more likely method is to challenge the facts of an affidavit presented to the magistrate.[45] To challenge the validity of an affidavit a defendant must prove a false statement was made, the officer signing the affidavit knew or should have reasonably known the fact to be false, and that fact must have been material to the finding of probable cause.[46]

The process of collecting information in preparation of an affidavit for a search warrant has become increasingly complicated with the involvement of continuous and autonomous monitoring, the use of artificial intelligence paired with machine learning, and the reliance upon highly complex mathematical and statistical computer algorithms serving as the basis of information.[47] This paradigm shifts the credibility and reliability of information away from highly trained police officers and scientist who incorporate experience, logical reasoning, and highly consistent and repeatable certified processes.

For example, DUI traffic stops, occurring over one million times a year, routinely rely upon breathalyzer electronic devices to calculate the blood alcohol concentration (BAC) of a suspected impaired driver.[48] In an investigation by the

[37] Rainsberger v. Benner, No. 17-2521 (7th Cir. 2019).
[38] Illinois v. Gates, 462 U.S. 213 (1983).
[39] Illinois v. Gates, 462 U.S. 213 (1983).
[40] Illinois v. Gates, 462 U.S. 213 (1983).
[41] Aguilar v. Texas, 378 U.S. 108 (1964).
[42] United States v. Reddrick, 90 F.3d 1276 (7th Cir. 1996).
[43] *U.S. Const. amend. IV.*
[44] Groh v. Ramirez, 540 U.S. 551 (2004)
[45] Franks v. Delaware, 438 U.S. 154, 171-2, 98 S.Ct. 2674, 2684-5 (1978)
[46] Franks v. Delaware, 438 U.S. 154 (1978)]
[47] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019).
[48] Birchfield v. North Dakota, 136 S. Ct. 2160, 2180, 195 L. Ed. 2d 560 (2016).

New York Times, it was found that the highly sensitive machines regularly skew the results by nearly 40% higher than expected. [49] The article went on to state "Technical experts have found serious programming mistakes in the machines' software. States have picked devices that their own experts didn't trust and have disabled safeguards meant to ensure the tests' accuracy."[50] Growing concerns have resulted in tens of thousands of tests being ignored, motions to examine and compel filed, and judges reconsidering the test's weight.[51] As a result, judges are now using language regarding the tests like "extremely questionable," a "magic black box … significant and continued anomalies"[52]

As law enforcement shifts their focus to internet crimes these very same issues have begun to arise. As previously discussed, law enforcement relies upon autonomous monitoring software that relies upon conduct, a non-illegal download of a torrent, as the basis of a search warrant.[53] Due to the nature of a computer, the search for a specific crime entails the search of every sector on its' hard drive and the networks it connects to. When the government fails to find the illegal content, by forensic examination, that the software alleged was present, they inevitably are able to find some form of illegal conduct to charge a suspect with, even if completely unrelated to the initial warrant.[54] This backdoor approach is made possible by the plain view doctrine which allows police to seize any evidence found during the normal course of their "legal" search.[55]

When the government is challenged on the reliability of search warrants it routinely argues that regardless of the question, police acted in good faith when conducting the search and thus the exclusionary rule should not apply.[56] The Supreme Court has held that police officers who act in good-faith when executing a search warrant shall not be punished by the exclusionary rule unless the underlying warrant was so lacking in probable cause that it could not have been reasonably relied upon.[57] Courts today allow police to reasonably rely upon faulty computer records as the sole basis of probable cause with no other corroboration.[58]

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[49] New York Times, These Machines Can Put You in Jail. Don't Trust Them (November 3, 2019), https://www.nytimes.com/2019/11/03/business/drunk-driving-breathalyzer.html
[50] *Id.*
[51] Florida v. Conley, No. 48 - 2012 -CT-000017- A / A (Orange County, FL September 22, 2014).
[52] Florida v. Conley, No. 48 - 2012 -CT-000017- A / A (Orange County, FL September 22, 2014) (https://int.nyt.com/data/documenthelper/1935-orange-county-decision-2014-breath-tests/d785cd5b0e65bdc10755/optimized/full.pdf#page=1)
[53] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019).
[54] *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).
[55] Arizona v. Hicks, 480 U.S. 321 (1987).
[56] United States v. Leon, 468 U.S. 897 (1984).
[57] United States v. Leon, 468 U.S. 897 (1984).
[58] *See* Arizona v. Evans, 514 U.S. 1 (1995) (holding a clerical error in a computer record is insufficient for the exclusionary rule to apply).

As a result, even when the investigative software makes mistakes and is the basis of a search warrant, any ancillary evidence found becomes admissible at trial.

One of the primary mistakes proponents challenge is whether the investigative software searched, monitored, or attempted to download files outside of areas publicly shared. Information obtained from an illegal search, subsequently used in a warrant could render it void. This question can only be answered through examination of the investigative software, and is material to challenging the search and Fourth Amendment protections. At least one district court has held a "request to access police investigative software met Rule 16 standard where production was relevant to whether the government violated the defendant's Fourth Amendment rights."[59]

Sixth Amendment: Right of Confrontation

The Fourth Amendment is not the only constitutional right potentially implicated by the Government's failure to produce discovery of investigative software for independent examination. The Sixth Amendment's confrontation clause is also challenged.[60] Courts have described the right of a confrontation as a "fundamental right essential to a fair trial and is made obligatory on the States by the Fourteenth Amendment."[61] The confrontation clause provides a defendant with the right to cross-examine witnesses, and the evidence they are testifying to.[62] This right extends to forensic reports offered for proof of the matter asserted and testimonial in nature.[63] For such a report, the person who performed the testing must be made available for cross-examination.[64]

The analysis of what items are testimonial have not been clear, but multiple relatively recent Supreme Court cases have aided in redefining the confrontation clause and the definition of "testimonial."[65] Testimonial is best defined as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[66]

The issue of testimonial evidence becomes more complicated when computers, not humans, are performing the analysis and report generation, as a computer cannot testify or be cross-examined. Records that are fully-computer

[59] *See* United States v. Ocasio, No. EP—11—CR—2728—KC, 2013 WL 2458617, at *3-*4 (W.D. Tex. June 6, 2013)
[60] U.S. Const. amend. VI.
[61] Pointer v. Texas, 380 U.S. 400, 403-406 (1965).
[62] *U.S. Const. amend. IV.*
[63] Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004)
[64] Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009)
[65] Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009)
[66] Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2531 (2009) (quoting Crawford, 541 U.S. at 52).

generated have consistently been found to not be testimonial.[67] An example of fully computer-generated records would be a billing statement.[68] Subsequent courts have differentiated between computer-generated and computer-stored records holding that while computer-generated records are not testimonial computer-stored records are.[69] Reports derived from information in computer-generated records may become testimonial, even if the underlying log may not be.[70] In *United States v. Cameron*, Yahoo! used automated monitoring to identify potentially illegal files.[71] Once a suspected account was identified, a report with the user's information was compiled and sent to the National Center for Missing and Exploited Children (NCMEC) for investigation and potential prosecution.[72] The court in *Cameron* found the report to NCMEC to be testimonial and outside of the business records exception, as such the Yahoo! analyst would be required to testify for the report to be admissible.[73]

Recent advancements have gone a long way to support a defendant's right to cross-examine an accuser who has generated a report to be used in litigation.[74] These advancements though do not address issues of credibility related to the underlying data being testified about.

Federal Rules of Criminal Procedure: Rule 16 Discovery

The use of investigative software by law enforcement has not only raised issues of constitutionality, but additionally directly challenges the discovery standard of criminal procedure.

In accordance with the U.S. Constitution every defendant is entitled to due process and to confront the evidence and witnesses against them.[75] As a matter of due process, a defendant must be aware of the charges against them, the evidence to be presented, and the existence of any evidence that could be exculpatory.[76] Failure by a prosecutor to disclose such evidence is grounds for a reversal of the conviction.[77] For federal trials, the disclosure of evidence is governed by Rule 16 of the Federal Rules of Criminal Procedure.[78] Specifically, Rule 16 states in part:

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[67] *See* United States v. Lamons,532 F.3d 1251, 1263 (11th Cir. 2008); United States v. Moon, 512 F.3d 359, 362 (7th Cir. 2008); United States v. Washington, 498 F.3d 225, 230 (4th Cir. 2007); United States v. Hamilton, 413 F.3d 1138, 1142 (10th Cir. 2005); United States v. Khorozian, 333 F.3d 498, 506 (3d Cir. 2003).
[68] United States v. Cameron, 699 F.3d 621 (1st Cir. 2012).
[69] Commonwealth v. Royal, 89 Mass. App. Ct. 168 (2016).
[70] United States v. Cameron, 699 F.3d 621 (1st Cir. 2012).
[71] United States v. Cameron, 699 F.3d 621 (1st Cir. 2012).
[72] United States v. Cameron, 699 F.3d 621 (1st Cir. 2012).
[73] United States v. Cameron, 699 F.3d 621 (1st Cir. 2012).
[74] United States v. Cameron, 699 F.3d 621 (1st Cir. 2012).
[75] U.S. Const. amend. V, VI.
[76] Brady v. Maryland, 373 U.S. 83 (1963).
[77] Brady v. Maryland, 373 U.S. 83 (1963).
[78] Fed. R. Crim. P. 16(a)(1)(E)(i).

> *"Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant."*[79]

Additionally, the intent and purpose of Rule 16 must be assessed to ensure appropriate application. The purpose of Rule 16 is to allow for discovery when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[80] The intent of Rule 16 is to "avoid[]…an unfair trial to the accused."[81] Determinations of discovery should fall in favor of the defendant unless otherwise determined.

Defense attorneys, as part of their request for production, include requests for all data, source code, and manuals related to the Government's investigative software that served as the sole basis of probable cause and being proffered as evidence of guilt.[82] Attorneys are met with denials and claims that the requested materials are not material and furthermore are protected by the "law enforcement privilege."[83] As previously highlighted, the government is aware of the high risk that their software could be found unreliable and considered a "magic black box" very similar to the results of successful investigation into breathalyzers.[84] Thus, when the government is ordered to disclose the software it elects to drop the charge in an effort to prevent any form of inspection.[85]

In the event of a denial, an attorney has the available remedy of petitioning the court for an order to produce through the use of a motion to compel and for independent examination.[86] Judges hearing such motions are provided wide latitude in decisions of discoverable evidence.[87] Courts across the country are split on whether to compel the production of investigative software for examination.[88]

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[79] Fed. R. Crim. P. 16(a)(1)(E)(i).
[80] United States v. Bagley, 473 U.S. 667, 682 (1985) (discussing the *Brady* materiality standard).
[81] Brady v. Maryland, 373 U.S. at 87.
[82] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019).
[83] Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957).
[84] Florida v. Conley, No. 48 - 2012 -CT-000017- A / A (Orange County, FL September 22, 2014)
[85] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019).
[86] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019).
[87] United States v. Hintzman, 806 F.2d 840, 846 (8th Cir. 1986).
[88] United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012); United States v. Pirosko, 787 F.3d 358 (6th Cir. 2015).

The 9th Circuit supports this while the 6th Circuit has denied such a motion.[89] However, other circuits have begun to hear similar arguments.[90] The arguments and outcomes have relied heavily upon the Court's interpretation of "materiality." Relying on *Mooney* and *Pyle*, the Court in *Brady* established the "material" requirement reflected in Rule 16 to "avoid[]…an unfair trial to the accused."[91]

The Eighth Circuit defines "material" information for purposes of Rule 16 as information that is "helpful to the defense."[92] However, a showing of materiality requires more than "a mere conclusory allegation" of the requested information's materiality.[93]

In the 9th Circuit case *US v. Budziak* law enforcement used a modified version of a peer-to-peer file sharing software to download files from an IP address they believed was distributing child pornography.[94] In his motion to compel, forensics experts "presented evidence suggesting that the FBI may have only downloaded fragments of child pornography files from his 'incomplete' folder, making it 'more likely' that he did not knowingly distribute any complete child pornography files to [the FBI]."[95] Budziak also presented "evidence suggesting that the FBI agents could have used the EP2P software to override his sharing settings."[96] The 9th Circuit found this evidence to be sufficient to establish materiality.[97] Cases such as *United States v. Crowe* have followed, also granting the motion to compel based on an expert's testimony that "some of the files alleged to have been found by law enforcement in the shared space of Defendant's computer, were not found there during her analysis."[98]

In contrast, cases such as *United States v. Pirosko* have denied a motion to compel for investigative software.[99] In *Pirosko*, the court found the defendant "failed to produce any such evidence, simply alleging that he might have found such evidence had he been given access to the government's programs."[100] Subsequently, the circuit held materiality is insufficient when a request is used to determine the validity and/or reliability of the Government's forensic evidence and

[89] United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012).
[90] United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012); United States v. Pirosko, 787 F.3d 358 (6th Cir. 2015).
[91] Brady v. Maryland, 373 U.S. at 87; Mooney v. Holohan, 294 U.S. 103 (1935); Pyle v. Kansas, 317 U.S. 213 (1942).
[92] United States v. Vue, 13 F.3d 1206, 1208 (8th Cir. 1994).
[93] United States v. Krauth, 769 F.2d 473, 476 (8th Cir. 1985).
[94] United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012).
[95] United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012).
[96] United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012).
[97] United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012).
[98] United States v. Crowe, No. 11 CR 1690 MV, 2013 U.S. Dist. LEXIS 189674, 2013 WL 12335320, at *7 (D.N.M. Apr. 3, 2013).
[99] United States v. Pirosko, 787 F.3d 358 (6th Cir. 2015).
[100] United States v. Pirosko, 787 F.3d 358 (6th Cir. 2015).

to assess the information provided in the affidavit in support of the search warrant.[101]

These lines of cases have created a bi-modal test for determining the materiality of evidence for discovery purposes. Such a test inherently requires proof of a defect to investigate whether a defect exists, which is circular in nature. This test is equivalent to requiring a negative to be proved, for it to be negative. This shifting of the burden to the defense will continue to become even more challenging as technology advances.

Regardless of the Government's success in arguing materiality, an assertion of the law enforcement privilege and third-party ownership are raised. The purpose of the law enforcement privilege is to protect law enforcement techniques and procedures, to safeguard the privacy of individuals involved, and otherwise to prevent interference with an investigation.[102] A balancing test must be applied to weigh the government's interest versus those of a defendant to defend themselves.[103] Those courts that have gone beyond the issue of materiality and considered the issue of the law enforcement privilege have ruled the privilege is not applicable, i.e. *Crowe*.[104] Courts have distinguished the use of exploits in software and have consistently enforced the privilege.[105]

As for third-party ownership, an analysis must be performed to determine if the software functioning as an "instrument or agent of the Government."[106] Investigative software, such as Torrential Downpour and CPS, used in *Gonzales*, is developed for the explicit purpose of autonomously monitoring and directly downloading suspected files from a suspect's computer, circumventing traditional peer-to-peer protocols to bolster evidentiary value.[107] To prevent the undermining of future investigations, courts have successfully provided instructions on confidentiality such as, "Any proprietary information regarding the software that is disclosed to the defense expert shall not be reproduced, repeated or disseminated in any manner."[108]

As can be expected, with multiple layers of tests being applied, the outcomes of the courts across the country have been inconsistent at multiple steps of the

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[101] United States v. Popa, No. 19-3807, 2020 U.S. App. LEXIS 17212, at *9 (6th Cir. May 29, 2020) (considered an unpublished opinion)
[102] In re Dep't of Investigation of the City of N.Y., 856 F.2d 481, 484 (2d Cir. 1988)
[103] Wells v. Connolly, No. 07 Civ. 1390 (BSJ)(DF), 2008 U.S. Dist. LEXIS 78818, 2008 WL 4443940, at *2 (S.D.N.Y. Sept. 25, 2008)
[104] United States v. Crowe, No. 11 CR 1690 MV, 2013 U.S. Dist. LEXIS 189674, 2013 WL 12335320
[105] United States v. Gaver, No. 3:16-cr-88, 2017 U.S. Dist. LEXIS 44757, at *1 (S.D. Ohio Mar. 27, 2017) (law enforcement seized the PlayPen website and deployed malware to visitors to collect information about the visitors for future prosecution)
[106] Coolidge v. New Hampshire, 403 U.S. 443 (1971)]
[107] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019)
[108] United States v. Crowe, No. 11 CR 1690 MV, 2013 U.S. Dist. LEXIS 189674, 2013 WL 12335320

analysis.[109] The tests are highly fact specific, require a strong technical understanding of the underlying facts, and require a willingness to allow discovery even when defendants are charged with the most reprehensible offenses.

With the mixed results, the Government sometimes loses and is ordered to produce the software used in investigating a suspect. When the Government is unsuccessful, the charges are often dropped or a very favorable plea deal is reached to avert production.[110] Shockingly, if the defendant's initial trial is in state court and the prosecution is required to produce the software resulting in the charges being dropped, a prosecution of the same defendant for the same offense may proceed in federal court and allows the prosecution to fully relitigate the discovery issue, assuming each have a statute prohibiting the conduct.[111] Simply put, the double jeopardy constitution protection does not apply when a state and the federal government prosecute a defendant for the same conduct.[112] While the Government is afforded multiple attempts through forum shopping, a defendant's only remedy is an appeal at the conclusion of a trial. On appeal, the appellate court considers the denial of a motion to compel production, as an evidentiary matter within the trial court's discretion, and as such applies the very high abuse of discretion standard.[113] The abuse of discretion standard has been defined as "when [the appellate court is] left with the 'definite and firm conviction that the [district] court . . . committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors' or 'where it improperly applies the law or uses an erroneous legal standard.'"[114] Not only must a defendant show the lower court abused its' power, they must also show the error was not "harmless" to receive a reversal.[115]

Policy Analysis and Recommendation

As can be seen, the challenge imposed upon a defendant to successfully acquire information in preparation of their defense has become nearly insurmountable without some level of discovery of the investigative software. In the absence of access to forensically examine the software, a defendant realistically lacks the necessary information to: challenge probable cause of the initial search, prepare a defense, or confront and potentially impeach witnesses.

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[109] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019); United States v. Pirosko, 787 F.3d 358 (6th Cir. 2015).
[110] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019)
[111] *See* Pro Publica, Child Porn Charges Being Dropped After Software Tools Questioned (April 3, 2019), https://patch.com/us/across-america/child-porn-charges-being-dropped-after-software-tools-questioned
[112] United States v. Lanza, 260 U.S. 377 (1922).
[113] United States v. Blood, 435 F.3d 612, 627 (6th Cir. 2006).
[114] United States v. Haywood, 280 F.3d 715, 720 (6th Cir. 2002) (quoting Huey v. Stine, 230 F.3d 226, 228 (6th Cir. 2000)).
[115] United States v. Vasilakos, 508 F.3d 401, 406 (6th Cir. 2007).

Currently, a defendant must identify the material defect of software prior to gaining access for examination.[116] Drawing such requisite information solely from computer-generated logs is nearly impossible, in the absence of blatant errors. Forensic experts, followed by courts, on a large number of instances have begun to openly recognize issue of reliability related to algorithmically created data across the spectrum of cases including driving under the influence, child pornography, and violations of copyright law.[117]

Until the issue of credibility of such software is adequately challenged and combatted, the computer-generated results will continue to serve as the sole basis for potentially erroneous searches, seizures, and arrests. The Government currently has no disincentive to ensure accuracy, even when reliance on investigative software is found to be faulty, and any evidence or contraband detected during the execution of a search warrant is legally admissible due to the good-faith exception.[118]

While existing standards and tests of law are highly favorable to the prosecution, the desires for meritorious "materiality" claims is understandable. The burden imposed upon the Government if required to allow examination by each defendant would be highly redundant and resource intensive. One of the major differences in technology crimes versus drug crimes is the inability of experts to perform testing without an identical environment. In a drug crime, a scientist is able to perform their own tests with their own equipment, and nothing about the process is proprietary or "secret". Technology crimes on the other hand, make use of complex algorithms that are device, software version, and network dependent.

The Government asserts the production of such software for examination would jeopardize future investigations if criminals learned the innerworkings of the software.[119] The Government's argument ignores that lawyers and their associated experts are officers of the court. Furthermore, this approach of preventing examination by experts is in sharp contrast to the activities these same experts perform in drug and weapon crimes. Experts should be provided with full access to investigative software for analysis to create parity with existing standards and customs used with other evidence.

The existing materiality standard could work, but only if independent examination also occurred. One method of ensuring such independence is through a reputable organization such as the Electronic Privacy & Information Center or the Electronic Frontier Foundation. By incorporating an independent certifying body, the risk of constitutional violations would substantially be reduced.

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[116] United States v. Pirosko, 787 F.3d 358 (6th Cir. 2015).
[117] Florida v. Conley, No. 48 - 2012 -CT-000017- A / A (Orange County, FL September 22, 2014) (
[118] United States v. Katzin, 769 F.3d 163, 182 (3d Cir. 2014).
[119] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019)

While a bit unconventional, the regular certification and testing of investigative technology is not new.[120] Across the country a system of breathalyzer certification, testing, and recertification has been implemented to ensure the investigate device are providing accurate and valid results.

Recall the scenario introduced at the beginning of the note. You had done absolutely nothing illegal were subjected to an FBI home raid and search, arrested, vilified in the press, and had your family torn apart. Without access to examine the software, the only evidence the jury will see is the incorrect computer-generated logs that claim you are guilty. Were you given a fair trial? Were you afforded due process?

Courts analyzing this split many years ago succinctly and perfectly stated, "It is quite incomprehensible that the prosecution should tender a witness to state the results of a computer's operations without having the program available for defense scrutiny and use on cross-examination if desired."[121]

[120] Fisher v. City of Eupora, 587 So.2d 878, 888 (Miss.1991) (*quoting Gibson v. Mississippi*, 458 So.2d 1046, 1047 (Miss.1984)).
[121] United States v. Liebert, 519 F.2d 542, 547-48 (3d Cir. 1975) and United States v. Di-oguardi, 428 F.2d 1033, 1038 (2d Cir. 1970).

The following writing sample is a memorandum analyzing the likelihood of client conviction based upon the Ohio criminal statute for burglary.

Writing Sample

Jesse Hockenbury

Jesse Hockenbury

MEMORANDUM

Privileged Attorney Work Product

TO: Professor Peterson

FROM: 52152

DATE: November 30, 2018

RE: Kurt Angle: Preliminary analysis of the likelihood of conviction for burglary (File #18-1250)

Issue

Under the Ohio burglary statute, is a defendant likely to be convicted when the defendant entered a school on a summer day while it was out of session, entered a room where police were awaiting, was carrying an empty duffel bag, and while being interviewed stated his intent was to cool down?

Brief Answer

Most likely. The State must prove four elements to convict a defendant of burglary and they are the following: (1) the use of force, stealth, or deception; (2) to trespass; (3) in an occupied structure; (4) with the purpose to commit a criminal offense.

The State must prove force, stealth or deception was used to and/or during a trespass as a method for avoiding detection.

The option of force will likely be met. Mr. Angle exerted force to open a "closed" door. Even if the door had been ajar, it is foreseeable and could be inferred the door would

have been opened further to enter. Because the State can prove Angle used force this element will be successfully met.

The option of stealth will likely not be met. While Mr. Angle potentially looked both ways the circumstances of his actions do not infer the purpose of avoiding detection. Mr. Angle was looking to enter the building but was not concerned with others spotting him. Because he did not use stealth the State cannot use this option.

The option of deception is undisputed. Mr. Angle did not interact with or create any form of false impression to enter or remain within the school. The State will fail to prove deception.

The element of force, stealth or deception can successfully be met because Mr. Angle used force to enter the school.

The element of trespass is undisputed. Mr. Angle nor the school administration contend that permission was tendered. Because Mr. Angle lacked permission to enter the school the State's burden on this element has been successfully met.

To prove the school was an occupied structure the State must prove that a person was present or likely to be present in the building. On the element of a person being present, the State will succeed in showing that police officers were present in the school during the trespass, therefore satisfying the actually present element. For likely to be present, the State will fail to adequately prove there was a logical expectation that someone would be present at 6 p.m. on a day when classes were out of session and would be for the entirety of the week. The State must only prove either someone was present or likely to be present, therefore the school will be considered an occupied structure.

Finally, the State must prove the defendant trespassed with the purpose to commit a criminal offense. The purpose can be created at any point during the trespass. The State has several pieces of circumstantial evidence which point to Angle's intent being theft. The evidence includes a witness who observed Angle peering into windows and attempting entry into each door, Angle's possession of an empty duffel bag, and quick navigation to the valuables once trespassing. Because the circumstantial evidence provides a strong inference that Angle entered the school with the intent to commit criminal offense the State will successfully prove intent.

Facts

Kurt Angle (Mr. Angle) has been referred to our office by Professor Peterson, a friend to the Angle family, for a preliminary analysis of whether he will be convicted of burglary under Section 2911.12(A)(3) of the Ohio Revised Code.

Mr. Angle was very successful throughout his high school career both academically, achieving a 3.67 GPA, and athletically as a hockey player. His performance led to being offered acceptance to and a scholarship from Union College. Sadly, late into Mr. Angle's high school career, he began getting into trouble with law enforcement in ways incurring arrests for drug possession, petty theft, and writing bad checks. When Union College learned of his new behavior it revoked his acceptance and financial aid.

Since graduating high school, Mr. Angle has consistently been gainfully employed. At the time of the incident, Angle was employed as an Assistant Landscaper at Cutting Crew Lawn Care. The wages being earned by this position were to be garnished because

Angle was behind on child support owing a total of $9,000, and accumulating an additional $500 each month.

On Monday, June 11th Nicole Bella (Ms. Bella), a neighbor who lived across the street from the school, witnessed Mr. Angle loitering in the empty parking lot of Holy Name Middle School. Ms. Bella informed the police of the stranger's presence in the school parking lot. The presence of a stranger stood out to Bella, because the school had closed a few days prior for the summer and would not be reopened for summer school for another week. Ms. Bella continued to watch the individual as he peered in each window and tried each door until he entered a door that was possibly ajar on the far side of the building.

The police arrived and entered the front door of the school. Officers waited in a classroom with valuables for the potential trespasser. Shortly after, Mr. Angle entered the room with an empty duffel bag. Upon entering, the officers arrested Mr. Angle and transported him to headquarters.

Once at the police station, officers questioned Mr. Angle on why he had entered the building. Mr. Angle stated that he entered not for the purposes of stealing but rather to escape the heat because he had nowhere to go. After offering this defense he terminated the interview and requested counsel.

Discussion

Ohio burglary statute requires the State to prove four elements to convict a defendant of burglary and they are the following: (1) the use of force, stealth, or deception; (2) to trespass; (3) in an occupied structure; (4) with the purpose to commit a criminal

offense. Ohio Rev. Code Ann. § 2911.12. The State's failure to meet a single element of the burglary statute would result in an unsuccessful attempt to convict.

A. Force, Stealth, or Deception

The State must prove a defendant used force, stealth, or deception to or during trespass. Ohio Rev. Code Ann. § 2911.12. The State must only prove Mr. Angle performed one of these options to satisfy this element. Ohio Rev. Code Ann. § 2911.12.

i. Force

The State can use force as one way to prove the first element of the burglary statute. Ohio Rev. Code Ann. § 2911.12. Force is satisfied by any effort physically exerted during the commission of a trespass. State v. Hudson, 106 N.E.3d 205 (Ohio Ct. App. 2018).

Opening a closed door, even one that is unlocked, is sufficient to establish force. State v. Moore, 2006-Ohio-2800 (Ohio Ct. App. 2006). In *Moore*, a neighbor visited the apartment next door to have $25 returned that was borrowed. Id. The homeowner was not at the residence at the time. Id. The door to the apartment was unlocked, so the neighbor entered the residence. Id. While inside the apartment he stole a DVD player. Id.

The State will argue Angle forcefully entered the school. The door Mr. Angle entered was either closed or slightly ajar in either situation. Because the door was not open Angle would have needed to use force to enter. Like in *Moore*, the doorway was blocked by a door and therefore the act of further opening the door is force. Id. The fact the door may have been ajar does not change the outcome, force was required to open the door so Angle could enter.

In contrast, Angle will argue he did not use force to enter the school. The door was ajar meaning it was not closed and someone could enter. *Moore* only addresses a closed door, in this case the door was ajar. Id. At no point during the incident was forced used to pull a door open, break a window, or even move objects around the school. Once inside the school no force was exerted on any object within the school.

The court will likely find Mr. Angle exerted force to open a "closed" door. Even if the door had been ajar it is foreseeable and could be inferred the door would have been opened further to enter. Because the State can prove Angle used force this element will be successfully met.

ii. Stealth

The State can use stealth as one way to prove the first element of the burglary statute. Ohio Rev. Code Ann. § 2911.12. Stealth is defined as any secret, sly or clandestine act to avoid discovery to gain entrance into or to remain within a building or structure. State v. Dowell, 2006-Ohio-2296, 166 Ohio App. 3d 773, 853 N.E.2d 354 (2006).

Acts that can be considered stealth include ducking, peering around corners, exiting with exaggerated gentle strides, and carefully opening and closing the door to the outside. State v. Dowell, 2006-Ohio-2296, 166 Ohio App. 3d 773, 853 N.E.2d 354 (2006). In *Dowell*, the pastor of a church was preparing for a bank deposit of contributions. Id. While performing the counting, the pastor went to the restroom. Id. While in the restroom, an intruder entered the church quietly as to avoid detection. Id. The intruder progressed through the church hall by hall looking into office; prior to entering each hall

he looked both ways as not to get caught. Id. When the pastor returned to his office the money had gone missing, and the intruder had entered his office. Id.

The State will argue Mr. Angle entered the building with stealth. First, Angle entered the school when the school was out of session to aide in avoiding detection. Next, the State will point to Angle mingling in the parking lot for a period of time awaiting the perfect time to strike. When entering the door to the school, Angle looked both ways to ensure no one was watching prior to entering. The act of looking both ways to avoid detection occurred both in this case and that of *Dowell*. Id.

Conversely, Angle will argue he was not acting with stealth. His reasoning for standing in the parking lot is he had nowhere to go and found an empty parking lot to spend some time. When entering the school his only goal was to escape the heat and was unconcerned with becoming detected. Angle will also challenge the witness's account of events, and her ability to actually see what occurred. The witness was several hundreds of yards away from the doorway he entered but yet saw him look around. If Angle was attempting to avoid detection he would have seen the witness and aborted his entrance. Unlike *Dowell*, once inside the building he openly walked through the hall without concealing himself or becoming caught whereas the intruder hid around corners. Id.

The court will likely find Mr. Angle did not use stealth. While he potentially looked both ways when entering the door this alone was not enough to be stealthy. Stealth is used to prevent detection and Angle took no action to avoid detection shown by being present in the parking lot for a period of time prior to entering. The State will fail to prove stealth.

iii. Deception

The State can use deception as one way to prove the first element of the burglary statute. Ohio Rev. Code Ann. § 2911.12. Deception is the creation of or perpetuation of an impression, or uses a false impression while withholding information from the victim. In re Meachem, 2002-Ohio-2243 (Ohio Ct. App. 2002).

Mr. Angle did not interact with anyone or create any form of false impression to enter or remain within the school, therefore the issue of deception is undisputed. The State will fail to prove deception.

B. Trespass

The State must prove the defendant lacked authorization to be in the school and therefore trespassed. Ohio Rev. Code Ann. § 2911.12. Trespass is defined as a person's unlawful entry on another's land that is visibly enclosed. TRESPASS, Black's Law Dictionary (10th ed. 2014). Mr. Angle received neither implicit nor explicit permission to be in the school. Because he did not have permission, once Mr. Angle entered the school he became a trespasser. Mr. Angle nor the school administration contend that permission was tendered.

The element of trespass is undisputed. Because Mr. Angle lacked permission to enter the school the State's burden on this element has been successfully met.

C. Occupied Structure

To prove occupied structure, the State must prove a person was either (1) present in the school during the trespass, or (2) likely to be present during the alleged trespass. Ohio Rev. Code Ann. § 2909.01(C)(4).

i. Actually Present

A structure is considered occupied if another person, aside from the trespasser and any accomplice, is present during a trespass. Ohio Rev. Code Ann. § 2909.01. Any person in an area sufficiently part of a structure will suffice as present. State v. Dowell, 166 Ohio App. 3d 773, 853 N.E.2d 354 (Ohio Ct. App. 2006). The presence of any person during a burglary, inherently creates a substantial risk of serious physical harm to that person whether it be a homeowner, investigating bystander, or emergency personnel. Ohio Rev. Code Ann. § 2909.01.

A person need not be present during the initial trespass, but rather the arrival of a person at any point qualifies as present. State v. Fairrow, 2004-Ohio-3145 (Ohio Ct. App. 2004). In *Fairrow*, a trespasser entered an empty office building on a Saturday evening outside of the business's operating hours. Id. During the commission of the trespass the office owner learned of the break in, arrived and entered the office building confronting the intruder. Id. The court held that trespassing is a continuing offense, therefore the entry of the office owner converted the breaking and entering into a burglary as he was now present. Id.

The State will assert the presence of police officers constitutes the element of a person being present. There is ambiguity in whether the police entered before or after

Mr. Angle, but as shown by *Fairrow* the police may enter at any point during the trespass and will be considered as present. Id. The primary difference in this case and *Fairrow* is the difference between an office owner and the police arriving. To draw similarities, the State will argue the presence element was intended to protect all present persons from serious physical harm, including emergency personnel. Ohio Rev. Code Ann. § 2909.01.

Conversely, Mr. Angle will argue that no one was "actually present." Moreover, the presence of the police is a defining differentiation between his case and that of *Fairrow*. Id. In *Fairrow*, the owner of the office arrived, who had a relationship with the premises, compared to the police who had no relationship with the school. Id. The intent of the presence element was to protect those with a relationship to a premise from serious risk of physical injury. Mr. Angle will also argue policy, contending that the legislature did not include the presence element intending to convert a breaking and entering to a burglary if police arrived while the crime was in progress. The extension of being present to include police would unduly punish a trespasser far beyond the purpose of the element's inclusion.

The court will likely hold the presence of police satisfies the actually present element. For case precedent the court will look to *Fairrow*, where the courts held someone was present, if another person enters the structure during the trespass. Id. The *Fairrow* case is very similar in facts except for the individual who was present being a police officer rather than an office owner. Id. Without case precedent on the presence of a police officer, the court will look to the legislature's intent of the element; to enhance the charging of breaking and entering when a person is present as they will be put at risk of serious physical harm. In considering whether police officers are at risk of the same

harm, the answer would be yes. Therefore, the court would find the statute's intent was maintained. Finally, the court will take under advisement policy decisions, while not law, are important considerations. In this case, the court will likely rule to protect the actually present over the accused.

ii. Likely to Be Present

A building can be considered an occupied structure, even when no one is present, if evidence can show someone is likely to be present. Ohio Rev. Code Ann. § 2909.01. Likely present is defined as the "logical expectation," based upon the circumstances, that a person could be present. State v. Green, 18 Ohio App. 3d 69, 480 N.E.2d 1128 (Ohio Ct. App. 1984). If a structure is considered a dwelling, the presence of someone from time to time to maintain the property constitutes likely present. State v. Cantin, 726 N.E.2d 565, 132 Ohio App. 3d 808 (Ohio Ct. App. 1999). The school is a commercial building, not a dwelling, nor adapted for overnight accommodation. Because the school is not a dwelling, the prosecution must prove someone was likely to be present with circumstantial evidence.

When considering whether someone is likely to be present, factors such as operating hours, day of the week, time, and occupier's testimony play a role. State v. Fairrow, 2004-Ohio-3145 (Ohio Ct. App. 2004). In *Fairrow*, a trespasser entered an empty office building on a Saturday evening outside of the business's operating hours. Id.

During the trial, the office owner testified it was "highly unlikely" that he would be present on a Saturday evening, but that he did spend some Saturday mornings at the office. Id. There was also no evidence a cleaning crew or any other staff were likely be

present on this day and time. Id. The court therefore found no one was likely to be present in the office, based on the circumstantial evidence. Id.

The State will argue that teachers were likely to be present in the school throughout the week that classes were not in session, grading papers and preparing for their next courses. Further, the State will argue the presence of maintenance staff was likely, and that this factor was one primarily considered in *Fairrow*. Id. Next, the State will contrast this case from *Fairrow* by contending the crime occurred on a Monday, a common work day, versus a Saturday. Id. Finally, teachers staying past 6 p.m. was not unheard of compared to ***Fairrow*** where the victim explicitly stated he was rarely present at the time of the trespass. Id.

Angle will argue that no one was likely to be present in the school, because it was 6 p.m. on a day when classes were out of session, and would be for an entire week. Like *Fairrow*, the trespass occurred in the evening, outside of normal business hours, when it would have been rare for someone to be present. Id. In addition, the principal of the school stated to police the last day for staff had passed, inferring the building would be empty, this statement is similar to that in *Fairrow,* where the office owner admitted no one was likely to be present. Id. Because maintenance workers are considered staff and the last day for staff had passed it was unlikely anyone would be present.

The court will likely find no one was likely to be present in the school. Angle's position is strongly supported by the *Fairrow* case, which considers factors such as day, time, potential presence of a maintenance crew, and witness testimony. Id. In this case, the conduct occurred at 6 p.m. on a Monday during a planned break. During a planned summer break it was unlikely that school staff would be present, and if they were present

it would have been during normal school hours rather than in the evening. Furthermore, testimony by the principal indicated it was unlikely for someone to be present. Finally, there was no evidence a maintenance crew was likely to be present during this time.

D. Intent

To prove intent, the State must prove a person trespassed with the purpose to commit a criminal offense. Ohio Rev. Code Ann. § 2911.12. The purpose to commit a crime need not be developed at the beginning of a trespass, but rather can occur at any point during the trespass. State v. Moore, 2006-Ohio-2800 (Ohio Ct. App. 2006). There is a reasonable inference a person trespasses with the purpose to commit a criminal offense. State v. Kellogg, 2015-Ohio-5000 (Ohio Ct. App. 2015).

When a defendant is apprehended prior to committing a criminal offense, the inference of their intent still exists unless other circumstances can provide a different inference. State v. Kellogg, 2015-Ohio-5000 (Ohio Ct. App. 2015). While a competing inference may be proffered, the jury is not required to accept the alternative. Id. In *Kellog*, a landscaper was caught in the secured screened-in porch of a condominium by the homeowner. Id. The homeowner detected the presence of the burglar prior to a theft occurred. Id. The landscaper escaped prior to police arriving. Id. Following the intrusion, the homeowner found the screen door had been slit open next to the lock in order to open the door. Id.

At trial, the landscaper testified that he visited the house only to offer his landscaping services. Id. This alternative reasoning for his presence was offered to the jury as an alternative to a purpose of criminal intent. Id. The court held based on the

landscaper being on the back porch and the door being damaged in an area near the lock that an intent to commit a theft was present. Id. Further, the court held there is a general inference of criminal intent unless other circumstances infer otherwise. Id.

The State will argue Mr. Angle trespassed in the school to commit a theft of valuables. Prior to entering the school, Mr. Angle looked into each of the windows of the school identifying potential items that could be stolen. Upon seeing a room full of electronics, he attempted to enter each door until he found one he could enter. Further, Mr. Angle arrived at the school with an empty duffel bag which he intended to use as a tool to commit his burglary. Angle's goal to steal valuables was likely caused by a recent court decision that garnished his wages until he paid $9,000 in retroactive child support.

The State will also assert that while Mr. Angle offered an alternative reason for trespassing, the totality of the circumstances more solidly infers a criminal purpose, similar to *Kellog*. Id. Angle's peering into windows, presence and carrying of an empty duffel bag, and quickly entering the room with valuables are circumstances analogous to the location of the landscaper and damaged door in *Kellog*. Id. Because Angle identified where the valuables were, came prepared with a way to carry the stolen items, and subsequently went directly to the valuables the only reasonable inference is he entered the school with the purpose to commit a theft.

Conversely, Mr. Angle will insist his only intent was to escape the heat of summer. He was in a sad situation; his mother had kicked him out of his childhood home and onto the streets. Angle had very little, only able to take with him what he could fit in a duffel bag. He continued to carry the empty duffel bag with him both as a pillow for wherever he found to lay his head down for the night. While down on his luck, he was gainfully

employed and working to pay off his debts to the mother of his child. The school was empty and he felt it would be harmless to spend a couple hours out of the sun.

In contrast to *Kellog*, there was no circumstantial evidence that pointed to him attempting to commit a criminal offense. Id. In *Kellog*, the landscaper damaged the door near the lock to slide in the back door to avoid detection whereas Angle did not damage any doors or windows to gain entry. Id.

The court will likely find Mr. Angle entered the school with the purpose to commit a criminal offense. By default, a defendant conduct during a trespass is inferred to be for the purpose of committing a crime unless circumstances prove otherwise. Angle will provide an alternative of escaping the heat for the jury to consider. The circumstances prior to and during the trespass provide a stronger inference that his intent was to commit a theft.

Conclusion

The State will successfully prove all four elements to convict a defendant of burglary and they are the following: (1) the use of force, stealth, or deception; (2) to trespass; (3) in an occupied structure; (4) with the purpose to commit a criminal offense.

The State must prove force, stealth or deception was used to and/or during a trespass as a method for avoiding detection.

The option of force will likely be met. Mr. Angle exerted force to open a "closed" door. Mr. Angle will content the door was ajar and could be entered without force. Even if the door had been ajar, it is foreseeable and could be inferred the door would have been

opened further to enter. Because the State can prove Angle used force this element will be successfully met

The option of stealth will likely not be met. While Mr. Angle potentially looked both ways, the circumstances of his actions do not infer the purpose of avoiding detection. Mr. Angle will argue he was looking to enter the building but was not concerned with others spotting him. In comparison, the State believes the act of looking around alone qualifies as stealth. Because he did not use stealth the State cannot use this option.

The option of deception is undisputed. Mr. Angle did not interact with or create any form of false impression to enter or remain within the school. The State will fail to prove deception.

The element of force, stealth or deception can successfully be met because Mr. Angle used force to enter the school, and the State must only prove one of the acts occurred.

The element of trespass is undisputed. Mr. Angle nor the school administration contend that permission was tendered. Because Mr. Angle lacked permission to enter the school the State's burden on this element has been successfully met.

To prove the school was an occupied structure the State must prove that a person was present or likely to be present in the building.

For a person being actually present, the State will be able to show police officers were present in the school during the trespass. The court will review the intent of the statute to determine if police qualify as a present person. Based on the intent, the court

will find police are equally protected from the risks of burglary and therefore satisfy the actually present element.

For likely to be present, the State will fail to adequately prove there was a logical expectation that someone would be present at 6 p.m. on a day when classes were out of session and would be for the entirety of the week. The school was unable to provide any evidence a person was likely to be present whether that be teachers, maintenance staff, or even custodians.

Because the State must only prove someone was present or likely to be present, the school will be considered an occupied structure.

Finally, the State must prove the defendant trespassed with the purpose to commit a criminal offense. The purpose can be created at any point during the trespass. The State has several pieces of circumstantial evidence which point to Angle's intent being theft. The evidence includes a witness who observed Angle peering into windows and attempting entry into each door, Angle's possession of an empty duffel bag, and quick navigation to the valuables once trespassing. Mr. Angle will provide an alternative reason for being present, escaping the heat, but the circumstances do not strongly support this inference. Because the circumstantial evidence a theft was Angle's purpose the State will meet its burden of proving intent.

In conclusion, the state will likely succeed in proving (1) the use of force, stealth, or deception; (2) to trespass; (3) in an occupied structure; (4) with the purpose to commit a criminal offense.

Applicant Details

First Name	**Robert**
Last Name	**Mang**
Citizenship Status	**U. S. Citizen**
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Address	**Address** Street **10169 Maxine Street** City **Ellicott City** State/Territory **Maryland** Zip **21042**
Contact Phone Number	**202-880-0899**

Applicant Education

BA/BS From	**University of Maryland-College Park**
Date of BA/BS	**May 2012**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 15, 2020**
Class Rank	**33%**
Law Review/Journal	**Yes**
Journal(s)	**Federal Communications Law Journal**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Other**
Other Bar Admission(s)	**Not yet admitted**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

May 11, 2022

The Honorable John Copenhaver, Jr.
Robert C. Byrd United States Courthouse
300 Virginia Street East, Room 6009
Charleston, WV 25301

Dear Judge Copenhaver:

It is my pleasure to apply for a judicial clerkship in your chambers. I received my law degree with honors from the George Washington University Law School in May 2020. In law school, I served as Executive Editor of my law journal and developed my research and writing skills through a variety of law clerk positions. I worked part-time in each of my last five semesters.

After graduation, I had the opportunity to clerk in the Commonwealth of the Northern Mariana Islands. Although still in the United States, learning a system of law which is a little different was an enriching experience. Seeing the distinctions between the law on the mainland and in the Northern Mariana Islands afforded me a better understanding of each. I have really enjoyed both the writing aspects of the position as well as the court's role as a neutral decision maker. I started law school eager to advocate for my client's position but since my internship at the Maryland Court of Appeals, I have been becoming more interested in which interpretation of the law and facts is actually correct.

I am confident that my combination of experience and coursework will allow me to be successful in this position. I also have ties to the area. I was born in neighboring Maryland and my family still resides there. Both of my parents' families and my brother-in-law's family resides in Pennsylvania. In addition to my family's proximity, I have purchased several season passes to ski at Snowshoe, WV and enjoy spending time in Harpers Ferry. I am very excited at the prospect of residing in the great state of West Virginia year round. I have always wanted to drive through the state in the fall and visit so many of the state's cities I have not yet had the chance to see.

Sincerely,

[/s] Robert Mang

Enclosures

Robert Mang

10169 Maxine Street, Ellicott City, Maryland 21042 – 202-880-0899 – rmang3@gmail.com

EDUCATION

The George Washington University Law School -- J.D. *with honors*, Pro Bono Award: Gold (250+ hours) May 2020
GPA: 3.422 (3.867 Fall 2019)
Journal: Executive Editor, Federal Communications Law Journal – Vol. 72 (2019-2020)
Courses: Trial Advocacy, Complex Lit., Evidence, Federal Courts, Criminal Procedure, Admin Law
First-year: Completed 1L Year at the Catholic University of America

University of Maryland, College Park -- B.A. in Criminology and Criminal Justice May 2012

EXPERIENCE

U.S. Small Business Administration LOAN SPECIALIST Feb. 2021 – Present

- Evaluate applications for relief under the CARES Act utilizing credit history, tax returns, and cash-flow analysis

Superior Court of the Northern Mariana Islands, *Judge Roberto Naraja* JUDICIAL LAW CLERK Oct. 2020 – Oct. 2021

- Researched and drafted decisions; prepared bench memorandum concerning evidentiary questions and substantive law; co-chaired committee to create time standards; served on probation operating procedures working group

Municipal Securities Rulemaking Board LAW CLERK Feb. 2020 – July 2020

- Prepared memoranda examining the legislative history of an assortment of MSRB rules from inception to present

Communications Workers of America LAW CLERK Aug. 2019 – Feb. 2020

- Assisted in drafting a brief for a NLRB hearing concerning Section 7 rights to audio record a disciplinary hearing; as well as a comment submitted in opposition to a proposed rule modifying the election process

Mooney, Green, Saindon, Murphy & Welch, P.C. LAW CLERK May – July 2019

- Researched and analyzed the distinctions between a bill and two proposed amendments which would reform the process for rehabilitating multiemployer ERISA plans
- Drafted a post-arbitration brief in a dispute involving CBA interpretation after a failure to promote

D.C. Office of Human Rights LAW CLERK Feb. – May 2019

- Drafted investigative documents, reviewed party submissions, and performed fact-specific research for employment discrimination issues under the DC Human Rights Act

U.S. Securities and Exchange Commission, Division of Enforcement SPRING HONORS INTERN Feb. – April 2019

- In my second internship of the semester, I drafted a district court motion to return recovered funds to harmed investors; drafted action memorandum for commission approval summarizing steps taken and applicable law
- ANALYST/PARALEGAL Aug. 2012 – Nov. 2014: Reviewed tips received and spotted issues, researched case history, and identified connections to existing investigations in writing memorandum recommending next steps and additional leads to a supervising attorney

Amtrak, Office of General Counsel LAW CLERK May – Nov. 2018

- Performed legal research concerning employment law issues, contracts, arbitration, and privacy issues

The Court of Appeals of Maryland, Chambers of Judge Irma S. Raker (Ret.) INTERN Jan. – April 2018

- Helped draft an opinion pertaining to a witness being compelled to testify after invoking the Fifth Amendment

Mang Photo PROFESSIONAL PHOTOGRAPHER Nov. 2014 – May 2020

- Provide professional photography services to more than 130 wedding clients in a high-pressure field

Community Service: Christian Legal Aid of the District of Columbia (Sept. 9 2016 to Feb. 8 2019), Veterans Consortium Pro Bono Program (Aug. 25 2017 to Sept. 7 2018), and Bankruptcy Assistance Center (Sept. 21 2018 to Nov. 30 2018).

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G44899647
Date of Birth: 24-DEC

Date Issued: 01-FEB-2021

Record of: Robert Edward Mang III III

Page: 1

Student Level: Law
Admit Term: Fall 2017

Issued To: ROBERT MANG
264 16TH STREET SE
WASHINGTON, DC 20003-1552

REFNUM:44936327

Current College(s):Law School
Current Major(s): Law

Degree Awarded: J D 17-MAY-2020
Major: Law

WRITING REQUIREMENT MET (6413)
EXPERIENTIAL REQUIREMENT MET

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
NON-GW HISTORY:			
2016-2017	Catholic University of America		
LAW 6202	Contracts I	3.00	TR
LAW 6203	Contracts II	3.00	TR
LAW 6206	Torts	4.00	TR
LAW 6212	Civil Procedure I	3.00	TR
LAW 6213	Civil Procedure II	3.00	TR
LAW 6216	Legal Research And Writing	2.00	TR
LAW 6217	Introduction To Advocacy	2.00	TR
LAW 6230	Evidence	4.00	TR
Transfer Hrs: 24.00			
Total Transfer Hrs: 24.00			
GEORGE WASHINGTON UNIVERSITY CREDIT:			
Fall 2017			
Law School			
Law			
LAW 6208	Property Glicksman	4.00	A-
LAW 6210	Criminal Law Solove	3.00	B+
LAW 6214	Constitutional Law I Cheh	3.00	B+
Ehrs 10.00 GPA-Hrs 10.00 GPA 3.467			
CUM 10.00 GPA-Hrs 10.00 GPA 3.467			
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16%-35% OF THE CLASS TO DATE			
Spring 2018			
Law School			
Law			
LAW 6232	Federal Courts Gavoor	3.00	A
LAW 6250	Corporations Mitchell	4.00	A-
LAW 6268	Employment Law Schoenbaum	3.00	B
Ehrs 10.00 GPA-Hrs 10.00 GPA 3.567			
CUM 20.00 GPA-Hrs 20.00 GPA 3.517			
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16%-35% OF THE CLASS TO DATE			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Summer 2018			
LAW 6218	Professional Responsblty/Ethic Fairfax	2.00	A
LAW 6400	Administrative Law Gavoor	3.00	B
Ehrs 5.00 GPA-Hrs 5.00 GPA 3.400			
CUM 25.00 GPA-Hrs 25.00 GPA 3.493			
Fall 2018			
LAW 6252	Securities Regulation Sibay	3.00	B+
LAW 6256	Mergers And Acquisitions Mahon	2.00	B+
LAW 6285	Business Bankruptcy & Reorg. Mitchell	3.00	B
LAW 6657	Fed Communication Law Jrl Note	1.00	P
Ehrs 9.00 GPA-Hrs 8.00 GPA 3.208			
CUM 34.00 GPA-Hrs 33.00 GPA 3.424			
Spring 2019			
LAW 6236	Complex Litigation Trangsrud	3.00	B-
LAW 6266	Labor Law Babson	2.00	B
LAW 6272	Employee Benefit Plans Silverman	2.00	B
LAW 6402	Antitrust Law Longwell	3.00	B+
LAW 6657	Fed Communication Law Jrl Note Han	1.00	P
Ehrs 11.00 GPA-Hrs 10.00 GPA 3.000			
CUM 45.00 GPA-Hrs 43.00 GPA 3.326			
Good Standing			
Summer 2019			
LAW 6640	Trial Advocacy Gilligan	3.00	B+
Ehrs 3.00 GPA-Hrs 3.00 GPA 3.333			
CUM 48.00 GPA-Hrs 46.00 GPA 3.326			

********** CONTINUED ON PAGE 2 **********

University Registrar

The George Washington University Law School
2000 H Street, NW
Washington, DC 20052

May 12, 2022

The Honorable John Copenhaver, Jr.
Robert C. Byrd United States Courthouse
300 Virginia Street East, Room 6009
Charleston, WV 25301

Dear Judge Copenhaver:

I could tell you that Robert Mang, a graduate of the George Washington University Law School, who has applied for a clerkship in Your Honor's chambers, is an outstanding writer, a sophisticated legal thinker, and a quick study. Based on my experience with him in the Consumer Protection Law class I teach at GW Law, those are truthful statements. (Yes, he received the highest grade.) But the same could be said for most applicants. Instead, please allow me to describe the characteristics that set him apart from his colleagues.

Robert already has in-depth work experience across the legal sector. He interned for an appellate judge, thrived in the pressure cooker of the SEC's Division of Enforcement, spent a semester with the D.C. Office of Human Rights, clerked at a well-known boutique law firm, and worked in the legal department of a union. Through equal parts initiative and fearlessness, he has seized every opportunity that going to school in Washington affords a law student. The result: He is a resourceful, no-drama candidate who adapts well to new surroundings.

Robert is enthusiastic about the law. I've been an adjunct faculty member for 36 years, and Robert demonstrates the qualities that make the job rewarding. He comes to class on time, fully prepared and in the front row. He hasn't just read the assigned cases. He's consulted other sources to get a broader perspective on the issue. An articulate speaker and a respectful listener, Robert is a consistent class volunteer whose contributions elevate the conversation.

Robert is a business owner. Why does that matter? Because he has successfully juggled a heavy course load, demanding jobs, and responsibilities as Executive Editor of the Federal Communications Law Journal while supporting himself in part as a professional photographer. Clearly, a decade of managing wedding parties, family groups, and corporate clients has prepared him for success as a law clerk and in the legal profession. He knows how to deliver on employer expectations effectively and efficiently, squeezing more than 24 hours out of a day.

Robert would arrive on Day One with his sleeves rolled up, ready to take on more responsibility that the typical law school graduate. Please call me at (202) 326-3081 if there is more I can tell you about this impressive clerkship candidate.

Very truly yours,

Lesley Fair
lfair@law.gwu.edu

The George Washington University Law School
2000 H St NW
Washington, DC 20052

May 11, 2022

The Honorable John Copenhaver, Jr.
Robert C. Byrd United States Courthouse
300 Virginia Street East, Room 6009
Charleston, WV 25301

Dear Judge Copenhaver:

I am writing to enthusiastically recommend Robert E. Mang III for a clerkship in your chambers. Robert's intellect, passion for the law, work ethic, and poise make him a top tier candidate.

I was Robert's professor in Federal Courts and Administrative Law courses at The George Washington University Law School. Despite being two of the most difficult course offerings at the university due to the breadth and complexity of the subject-matter, Robert excelled. He asked refined questions that were premised on an underlying comprehension of the readings. He provided thoughtful and correct answers to my Socratic questioning. I was particularly impressed by how he was able to balance the rigor of studying the law with his busy intern schedule, and his service on the Federal Communications Law Journal, a journal for which he serves as the Executive Editor.

In my numerous conversations with Robert, I have encouraged him to clerk. He is genuinely interested in the law and the judicial experience. His legal training and judicial intern experience have fostered in him an unusually strong ability to read and apply statutory schemes in practical settings. His work ethic was evinced by his consistent preparedness in class. I believe that your investment in him as a law clerk would yield splendid results in terms of his timely and thoughtful contributions to your legal research and writing needs.

Robert has the temperament to capably serve as a clerk. He is humble, yet assertive and thoughtful, yet timely in his responsiveness. He is disciplined and consistent. Moreover, he is mature and exercises sound judgment with minimal need of supervision. If you have any questions about or would like to discuss my unreserved recommendation of Robert, please do not hesitate to contact me at (917) 562-9230 or at agavoor@law.gwu.edu.

Sincerely,

Aram A. Gavoor
Professorial Lecturer of Law
202-994-9320
dtsuk@law.gwu.edu

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Entirely Self Edited Writing Sample

RICO's broad reach may make it the best statute to fight health care fraud, but could a new Act go further?

This paper will examine how prosecutors can best protect consumers and their insurance companies from health care fraud. It is an important question because despite prosecutors' success – the Department of Justice ("DOJ") obtained over $3 billion in health care fraud judgments and settlements[1] in 2012 – health care fraud remains an enormous drain on both consumers' finances and the United States's economy as a whole. Some estimates indicate that as much as 10 percent of all health care costs may be fraudulent.[2] Prosecutors frequently rely on the False Claims Act, the Anti-Kickback Statute, and the Stark Self-Referral Law. While those statutes are often very potent tools, they are not without a glaring limitation. These laws only apply when the Federal Government is the victim of fraud but provide no protection to individual consumers or their insurance companies. Fortunately, while originally intended to protect Americans from mobsters, the Racketeer Influenced and Corrupt Organizations Act's ("RICO") broad reach is likely the best, and an equally potent tool, for both prosecutors and private plaintiffs to obtain justice where the federal government is not the victim. But as potent as RICO is, could a new statute which also has a mechanism for compensating whistleblowers actually be the best option?

The phrase "prosecutors" refers to numerous government actors. The Center for Medicare and Medicaid Services and the Office of Inspector General, both part of the U.S. Department of Health and Human Services, as well as other government agencies, are actively involved in prosecutions often led by the Department of Justice – including Main Justice, the United States Attorney's Offices, the Federal Bureau of Investigation and

[1] Michael Berry, Article, *Peeking Behind the Robes: A Not-So-Flattering Look at Medicare's Administrative Law Judges*, 12 IND. HEALTH L. REV. 65, 98 (2015) citing U.S. DEP'T OF HEALTH & HUMAN SERVS. & DEP'T OF JUSTICE, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM: ANNUAL REPORT FOR FISCAL YEAR 2012 1 (2013), archived at http://perma.cc/S53L-X6TQ.
[2] Joseph Avanzato, David Wollin, Article, *Health Care Fraud: Potential Pitfalls for Health Care Providers*, 44-Jan R.I. B.J. 9, 9 (1996).

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others – to fight health care fraud. References to "prosecutors" will collectively refer to all of the federal government's enforcement activities in the health care fraud arena.

Health care fraud includes a wide variety of nefarious activity. The most common health care frauds include billing for an unnecessary procedure or prescribing an excessive dosage of medication, charging for procedures and tests not performed, and prescribing unsolicited and unnecessary medical equipment to elderly patients.[3] The False Claims Act[4] is a *qui tam* law. *Qui tam* laws allow relators – private plaintiffs – to file suit on behalf of the government and receive between 15-30 percent of any judgement or settlement ultimately obtained.

Qui tam provisions have a long history. The first known citation to a *qui tam* law was the 695 C.E. declaration of King Wihtred of Kent which prescribed a penalty of a half a freeman's earnings who worked on the Sabbath with half of that penalty going to an informer.[5] Throughout history, *qui tam* laws have allowed private plaintiffs to sue on behalf of the sovereign – in England, the United States, and elsewhere – and receive a financial incentive for doing so. Like the False Claims Act, *qui tam* laws usually incentivize private plaintiffs to inform on those defrauding the government. RICO, lacks a *qui tam* provision, but perhaps the combination of the RICO framework with a new statute containing a *qui tam* provision would be the best tool for prosecutors?

The Anti-Kickback Act of 1986[6] prohibits receiving any money, gift, or thing of value in exchange for favorable treatment in making a service referral when the federal government is the payer. [7] What is commonly known as the Stark Self-Referral Law[8] prohibits a physician from marking referrals for health services to an

[3] Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 982-93 (2007).
[4] The False Claims Act, 31 U.S.C. § 3729, et seq.
[5] Qui Tam: The False Claims Act and Related Federal Statutes, Congressional Research Service, R40785 (August 6, 2009) available at https://fas.org/sgp/crs/misc/R40785.pdf *citing* Translated in Attenborough, THE LAWS OF THE EARLIEST ENGLISH KINGS 27 (1963); described in Plucknett, EDWARD I AND CRIMINAL LAW 31-2 (1960), and Beck, The False Claims Act and the English Eradication of Qui Tam Legislation, 78 NORTH CAROLINA LAW REVIEW 539, 567 (2000).
[6] 41 U.S.C. § 51 *et. seq.*
[7] U.S. Dep't of Justice, Anti-Kickback Act of 1986, § 927 Criminal Resource Manual available at http;//www.justice.gov/archives/jm/criminal-resource-manual-927-anti-kickback-act-1986
[8] Social Security Act § 1877, 42 U.S.C. § 1395nn

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entity with which he, she, or an immediate family member, has a financial relationship where Medicare or Medicaid is the payer unless an exception applies. All services are covered, including laboratory or diagnostic services; medical equipment; outpatient prescription drugs; speech, physical or occupational therapy; and inpatient or outpatient hospital services. [9] It is beyond the scope of this paper, but in certain circumstances, an exception allows a physician to make such a referral and still lawfully receive payment from Medicare or Medicaid.

In addition to potential loss of licensure, monetary penalties or jail time, violators of any of these laws can also receive the "civil death penalty[10]" which leaves the violator unable to directly or indirectly bill Medicare or Medicaid for services rendered.[11] The "death penalty" can apply when a health care provider "is convicted under any law, of fraud in connection with providing health care services or products, obstructing a health care fraud investigation, or the unlawful manufacture or distribution of controlled substances." [12] A minimum five-year exclusion from participating in the Medicare or Medicaid programs is required for health care fraud convictions or convictions under any state or federal law for abuse or neglect of patients.[13] A criminal, versus civil, conviction under RICO, or for Mail, and/or Wire fraud, is a felony conviction which would likely result in a loss of licensure and accordingly the loss of the ability to participate in Medicare or Medicaid (and provide health care services) regardless of whether the Federal Government imposed the civil death penalty.

Federal prosecutors, aside from more directly related statutes, also commonly rely on the mail and wire fraud statutes, anti-money laundering laws, and laws protecting employee benefit plans to bring actions – especially when the federal government is not the victim. Despite the numerous statutes available to

[9] Centers for Medicare & Medicaid Services, Physician Self-Referral available at https://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/index?redirect=/physicianselfreferral.
[10] Exclusion Statute, 42 U.S.C. § 1320a-7
[11] U.S. Department of Health & Human Services, Office of Inspector General, A Roadmap for New Physicians: Fraud & Abuse Laws available at https://oig.hhs.gov/compliance/physician-education/01laws.asp.
[12] *Joseph Avanvato, David Wollin, Health Care Fraud: Potential Pitfalls for Health Care Providers,* 44-JAN. R.I B.J. *9, 12-13*; *see generally* 42 U.S.C. § 1320a-7(b)(1)-(3).
[13] *Id., see generally* 42 U.S.C. § 1320a-7(a),(c)(3)(A).

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prosecutors, not all of which have been discussed in this paper, RICO actions with mail or wire fraud as the predicate offense may be the best statutory avenue for prosecuting health care fraud when the government is not the victim.

II. RICO is a powerful tool for prosecutors

The best avenue for prosecutors to bring enforcement actions against health care providers who have defrauded individual consumers and health insurance companies, but not the government or the Medicare/Medicaid programs, may be under the Racketeer Influenced and Corrupt Organizations ("RICO") statute. RICO was created in 1970 as Title IV of the Organized Crime Control Act. 18 U.S.C. §§ 1961-1968. Although the primary purpose of RICO is fighting organized crime, the Act offers tremendous flexibility. The diverse predicate acts which can form the basis of a RICO action can be grouped into five categories. First, violence; second, illegal goods or services (e.g., drugs, gambling, prostitution, illegal immigration); third, corruption in labor or management relations; fourth, corruption in government; and fifth, fraud.[14] The type of racketeering activity prohibited by RICO includes both certain state-law offenses and the specific federal crimes provided as predicate offenses.[15] The two most compelling features of the RICO statute, for this purpose, are the 1) harsh penalties provided for by the statute and 2) the broad reach of the Act. Although not relevant for prosecutors' purposes, RICO provides for a private right of action. State law RICO causes of action are available in at least 33 states.[16]

A. Penalties Available under RICO

[14] G. Robert Blakey, Article, *Time-Bars: RICO-Criminal and Civil-Federal And State*, 88 NORTE DAME L. REV. 1589, 1594 (2013) *citing* G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 300-06 (1982).
[15] Victoria L. Safrana, Article, *RICO's Extraterritorial Reach: The Impact of European Community V. RJR Nabisco,* 4 STAN. J. COMPLEX LITIG. 47, 48 (2016) citing § 1961(1).
[16] *Introduction: RICO State by State: A Guide to Litigation Under the State Racketeering Statutes, Second Edition.* American Bar Association. Archived from the original on February 22, 2014. Available at https://web.archive.org/web/20140222015455/http:/www.americanbar.org/publications/gpsolo_ereport/2012/november_2012/introduction_rico_state_by_state.html Retrieved April 4, 2020 at 6:54 p.m.

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Aside from its breadth, the best reason for utilizing RICO are the harsh civil and criminal penalties provided under the statute by Congress. Criminal penalties encompass up to 20 years of prison time (or life, when permitted by the predicate offense), fines of up to $250,000 or up to twice the gain or loss, and criminal forfeiture of ill-gotten gains. [17] Defendants can also be ordered to pay restitution to the victims of the criminal enterprise, which is not always available under criminal statutes.[18] RICO's provision of restitution is critical, as it allows for the victims of health care fraud to be made whole – at least monetarily. The civil portion of RICO provides for treble damages, "any person injured in his business or property by reason of a violation of section may sue therefor and shall recover threefold the damages he sustains"[19] (18 U.S.C. § 1964(c)) like the False Claims Act, and RICO is modeled after antitrust law. Although, not relevant for prosecutors' purposes, private plaintiffs no doubt find RICO's provision for awarding attorney fees appealing. The ability, however, to recover litigation expenses, like under the False Claims Act and other health care fraud statutes, is a relevant consideration for prosecutors.[20]

B. Broad Reach of RICO

RICO has long been recognized as a leading statute in fighting fraud, which is an area where other fraud deterrence statutes, outside of the False Claims Act and other health care fraud statutes, are scattered and often ineffective.[21] Ironically, this reflects Congress' concern in creating RICO. The statute's legislative history reveals that Congress "was concerned an overly narrow statute" would not reflect the legislative intent of providing a sledgehammer to fight organized crime.[22] Although RICO is frequently criticized as being overbroad, Congress' intention was just that, to create a broad tool for law enforcement. Senate debate focused on the statute being ineffective if not reaching crimes not always committed by organized criminals. [23] Both the

[17] 18 U.S.C. § 1963.
[18] §§ 3556, 3663.
[19] Engstrom, 115 MICH. L. REV. at 667.
[20] *Id.*
[21] Nora F. Engstrom, Article, *Retaliatory RICO and The Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 645 (2017).
[22] Alexander M. Parker, Note, *Stretching RICO to the limit and beyond*, 45 DUKE L. J. 819, 831 (1996).
[23] *Id* at 831-832.

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American Civil Liberties Union and the DOJ raised concerns that statute was "too broad and would result in a large number of unintended applications." *Id.* Congress ultimately would adopt the DOJ's proposed "model [enumerating] the generic clauses of crimes covered." [24]

To explain RICO's elements in plain English, the key elements require[25]:

> (a) "a "person" who has received income from a "pattern of racketeering activity" cannot invest that income in an "enterprise,"
>
> (b) a "person" cannot get or keep control of an "enterprise" by a "pattern of racketeering;"
>
> (c) a "person" who is employed by or associated with an "enterprise" cannot "conduct" the affairs of the "enterprise" through a "pattern of racketeering;" and
>
> (d) a "person" cannot "conspire" to violate RICO."

Finally, the prohibited acts must fall within the domain of affecting interstate commerce.[26] In other words, it is unlawful to engage, or conspire to engage, in a pattern of racketeering (dishonest or fraudulent business dealings) as part of an on-going enterprise. These elements are "deceptively simple, however, [because] each concept is a term of art which carriers its own inherent requirements of particularity."[27]

The text of RICO requires courts to liberally construe RICO in achieving its goals.[28] Where RICO's meaning is clear, the statute undoubtedly controls but even where ambiguous, a Court is required to find a construction which allows the statute to achieve its purpose of providing greater remedies and new sanctions.[29] Courts must follow this command regardless of the nature of the suit.[30] It has even been used in landlord-tenant skirmishes, interchurch disputes, and domestic relations conflicts.[31] Leading corporations, including Boeing,

[24] *Id* citing S. REP. NO. 617, 91st Cong., 1st Sess. 121-22, 158 (1969).
[25] Blakey, 88 NORTE DAME L. REV. at 1605-1614.
[26] Hoppe, 107 NW. U. L. REV. at 1382 citing 18 U.S.C. § 1962(a)-(d).
[27] *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989).
[28] Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970).
[29] Blakey, 88 NORTE DAME L. REV. at 1598.
[30] *Id.*
[31] *Id.* at 667.

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General Motors, and American Express have faced RICO suits.[32] Needless to say, this myriad of uses is not always well-received.

RICO requires continuing activity and "it is this factor of continuity plus relationship which combines to produce a pattern."[33] Any person, not just a mobster, is prohibited from using money derived from a racketeering enterprise by § 1962.*[34]* Most health care fraud involves a pattern of continuing fraud closely related to the provision of health care services in an ongoing enterprise. Caselaw shows each fraudulent act would not be viewed as single scheme but rather an ongoing fraudulent enterprise. Take *Northwestern Bell,* where the trial court rejected that logic in finding each allegation of bribery to be a single scheme rather the patten RICO required. [35] The Eighth Circuit affirmed but the Supreme Court reversed finding them to constitute a pattern because "they met the tests of "relatedness" and "continuity."'[36] It is the combination of "continuity" and "relationship" which creates the pattern.[37] A single patient is often the source of multiple instances of health care fraud. Health care fraudsters usually commit the same type of frauds against all their patients to form both relatedness and continuity throughout their organization.

RICO requires the "pattern of racketeering activity must somehow connect to "an enterprise" such as the operation of a hospital or a nursing home or other health care facility. [38] The Supreme Court also reads the text of the statute in the broadest possible manner despite repeated attempts by lower courts to reduce the breath of the enterprise requirement. [39] Under RICO, "an enterprise is broadly defined to encompass any individual or legal entity, or group of individuals in fact."[40] The term enterprise is explicitly defined in § 1961(4) as "includ[ing] any individual, partnership, corporation, association, or other legal entity, and any union or group

[32] *Id.* at 667-68.
[33] *Id.*
[34] *Sedima*, 473 U.S. at 495.
[35] Parker, 45 DUKE L. J. at 835 citing *H.J., Inc. v. Northwestern Bell Tel. Co.,* 648 F. Supp. 419, 420 (D. Minn. 1986).
[36] *Id.*
[37] Kevin J. Murphy, Note, *The Resurrection of the "Single Scheme" Exclusion to RICO's Pattern* Requirement, 88 NORTE DAME L. REV. 1991, 1994 (2013).
[38] Hoppe, 107 NW. U. L. REV. at 1380.
[39] Parker, 45 DUKE L. J. at 836; *see e.g. United States v. Turkette*, 452 U.S. 576 (1981).
[40] Safrana, 4 STAN. J. COMPLEX LITIG. at 48.

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of individuals associated in fact although not a legal entity."[41] Notably, the statute uses the phrase "includes" to indicate the list is not exhaustive.[42]

However, despite all of the benefits from RICO's breadth and penalties discussed, the RICO statute, without a *qui tam* provision does not provide the same benefit of financial incentives available to relators under the False Claims Act. Perhaps a new statute, using the framework of RICO, along with a *qui tam* provision could be the tool prosecutors need?

III. RICO's Limitations Require a New Statute

Health Care Fraud is often discreet and requires sophisticated knowledge which presents a delicate need for information from someone involved in the fraud to detect the wrongdoing. Common examples of health care fraud include administering and billing for an excessive dosage of medication or an unnecessary procedure, charging for procedures and tests not performed, and prescribing unsolicited and unnecessary medical equipment to elderly patients. All of these required detailed, inside knowledge to detect. Often a medical determination must be made, such as whether the dose of medication provided was inappropriate, which both prosecutors and private plaintiffs may lack the expertise to make.

Qui tam plaintiffs, however, who are immersed in the medical community with some level of medical training have the necessary expertise. They are often better able to identify health care fraud than prosecutors or private plaintiffs.[43] A further challenge lies in the enormous number of claims submitted. That volume is often enough to prevent the detection of the vast amount of fraud occurring in Medicaid and Medicare claims. The assistance of *qui tam* plaintiffs is essential to overcome the volume.[44] Physicians operate with a high level of

[41] Parker, 45 DUKE L. J. at 836 citing 18 U.S.C. § 1961(4) (1994).
[42] Hoppe, 107 NW. U. L. REV. at 1380 (2013) citing 18 U.S.C. § 1961(4).
[43] Broderick, 107 COLUM. L. REV. at 982-93.
[44] *Id.* at 984

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autonomy, professional curtesy, and presumption of trust and integrity making health care fraud all the more difficult to detect.[45]

Under a *qui tam* law like the False Claims Act, a relator receives 15 to 25 percent of the government's recovery. Frequently, relators are able to recover millions. Naturally, this is a powerful incentive. Aside from the financial incentive, the monetary reward mitigates relators' risk of retaliation and the harm to their careers that they likely will experience.[46]

The vast majority of health care providers are hardworking and extremely ethical, and they certainly should not be characterized in the same way as mobsters. That said, the situation is in some ways similar to the environment in which RICO was created. Fortunately, claims of intentional harm are at best very rare, but patient harm through neglect or willful blindness is sadly more commonplace. Patient welfare aside, the economic harm caused by health care fraud is unmistakable. Medical care is becoming more and more complex, health care costs continue to rise, and limitations imposed by private or public insurance limit profit margins. The temptation to commit health care fraud, perhaps unaware of the illegality of the action, is enormous. The data is unmistakable. Health care fraud judgements and settlements annually reach the billions while much of fraud is not reflected in that figure because it goes undetected, prosecutors are not always able to take action due to resource constraints, or the current application of existing laws creates enforcement gaps.

The legislative history of the False Claims Act and related statutes is even more complex than RICO's history. *Qui tam* provisions date back almost to the beginning of time and create the right to receive a handsome bounty for taking action on behalf of the King. In this country's history, major attention was given to this statutory tool first during the Civil War and then during the Cold War as a mechanism for restraining otherwise rampant fraud in government contracting.

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[45] *Id.*
[46] *Yerra v. Mercy Clinic Springfield Communities*, 536 S.W.3d 348 (Mo. App. S.D. 2017) (speaking to the dangers of retaliation whistleblowers face).

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Extending the reach of *qui tam* past fraud directly harming the sovereign is at best a radical proposition. But on the hand, many laws do just that under a different name. Antitrust laws, which RICO is modeled upon, allow private parties to recover treble damages through private enforcement of pro-competition laws to protect capitalism. It is not just abusing monopoly power or price fixing which expose wrongdoers to treble damages. Rather any harm to competition, in a way prohibited by antitrust laws, suffices. Health Care antitrust litigation is common, especially in rural areas. The Lanham Act allows companies to sue each other for treble damages in cases of trademark infringement, trademark dilution, and in some cases of false advertising.

The critical portion of a *qui tam* provisions is not the ability to bring action on behalf of the sovereign, the private right of action, but rather the ability for private plaintiffs to receive a bounty for, among other things, providing information to expose the fraud. However, like the False Claims Act, the Dodd-Frank Wall Street Reform and Consumer Protection Act provides in § 922 that the U.S. Securities and Exchange Commission ("SEC") shall provide an award of between 10 to 30 percent of total monetary sanctions recovered by the SEC (or DOJ) when a whistleblower voluntarily provides original information which exposes a violation of federal securities laws.[47] This is commonly known as the whistleblower provision. It is similar to the relator provisions of the False Claims Act in terms of the bounty provided but does not allow the whistleblower to bring a lawsuit. Other securities laws provide a private of action when harmed by fraud but would not provide for a whistleblower payment.[48]

Arkansas law provides for a similar type of whistleblower bounty without an explicit *qui tam* provision.[49] The provision does have the limitation, however, of only applying to fraud against the State of Arkansas rather than fraud against anyone. It is time for Congress to act to remove the limitation of only providing financial incentives in cases brought by a government actor when the government has been harmed.

[47] U.S. Securities and Exchange Commission, Whistleblower Program available at https://www.sec.gov/spotlight/dodd-frank/whistleblower.shtml; *see also* § 21(f) of the Securities Exchange Act of 1934, 17 C.F.R. 240, 249
[48] *See e.g.* § 10(b) of the Securities Exchange Act of 1934.
[49] Broderick, 107 COLUM. L. REV. 949, 957 *citing* Ark. Code Ann. §§ 20-77-902, -911(a) (1997).

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Government resources are often limited but still dwarf what is available to the private sector, both in terms of manpower and subject matter expertise.

There is no question both the creation of RICO and the development of the False Claims Acts arose under very unique circumstances. Dodd Frank, too, provided much sought after financial regulatory reform in the wake of the financial crisis. Yet, the penalties available under both RICO and the False Claims Act are very similar. In addition to criminal penalties, both statutes provide for treble damages, attorney fees, and mechanisms to allow for private enforcement. RICO contains a traditional private right of action, whereas prosecutors have oversight over relator actions brought under the False Claims Act. Discussed above, a variety of other existing laws allow for private enforcement of important public rights and/or mechanisms to provide financial incentives to whistleblowers.

Congress should act to create a new Omnibus Health Care Fraud statute which, while lacking an explicit *qui tam* provision, allows for whistleblowers to receive up to one-third of any recovery through a treble damages provision. The law would also allow recovery of attorney's fees but distinct from what portion a whistleblower may claim. Needless to say, the law would contain criminal penalties, when the government brings an action for fraud committed against individual consumers or private insurance companies, as well as a private right of action allowing for the recovery of treble damages.

Existing RICO laws, state laws and other federal statutes, as well as the False Claims Act, the Anti-Kickback Statute, and the Stark Self-Referral Law more frequently relied on by prosecutors to fight health care fraud are already most effective in policing fraud against the government. The gap in the laws for health care fraud not harming the government must be addressed. Until Congress acts, relying on RICO to address that gap is a powerful deterrent but without the expertise and insider knowledge of whistleblowers, RICO cannot be as effective as the False Claims Act.